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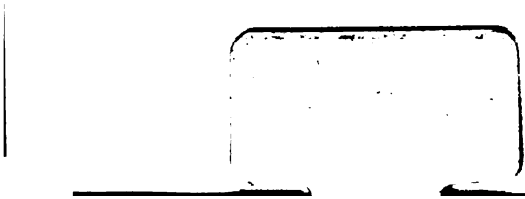

James T. Mitchell
1873.

CASES

IN THE

CIRCUIT COURT

OF

THE UNITED STATES,

FOR THE THIRD CIRCUIT.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. II.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS,
NO. 197 CHESTNUT STREET.
1854.

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PROCEEDINGS

OF

THE BAR OF PHILADELPHIA,

ON THE

OCCASION OF THE DEATHS

OF

CHARLES CHAUNCEY

AND

JOHN SERGEANT.

It was ordered by one of the Resolutions passed by the Bar on the occasion of Mr. Sergeant's death, that the proceedings of that body should be inserted as an obituary in this volume. Those upon the occasion of Mr. Chauncey's death, not very long before, the Reporter is sure, it will not be less acceptable to the Profession to have permanently preserved in a similar form. It was an incident of the meeting of the Profession, upon the death of Mr. Sergeant, that Mr. Binney, who had been permitted by Providence to survive these, his two eminent cotemporaries, and who had been called upon to say something in commemoration of both successively, then took his final leave of the Bar of Philadelphia.

DEATH OF CHARLES CHAUNCEY, ESQ.

A VERY large meeting of the members of the Bar of the City and County of Philadelphia was held at 12 o'clock on Friday, 31st August, 1849, in the room of the Circuit Court of the United States.

On motion of Charles Gibbons, Esq., the Hon. Robert C. Grier was called to the chair, and the Hon. George M. Dallas appointed Secretary.

Whereupon, on motion of F. W. Hubbell, the following resolutions were unanimously adopted, viz.:

Resolved, That we have heard, with sincere sorrow, of the decease of our professional brother, CHARLES CHAUNCEY, Esq., a gentleman who held the highest rank in his profession, and who has left upon our hearts and memories the recollection of an accomplished lawyer, of an eloquent advocate, and of a pure and upright man.

Resolved, That we will, each of us, in testimony of our veneration for the deceased, wear a badge of mourning during thirty days.

Resolved, That a Committee of five of our number, to be named by the Chairman, shall communicate to the family of the deceased our deep sympathy with them in their bereavement.

After the Resolutions were presented, MR. BINNEY rose, and addressed the Chair as follows:

When I entered this Court room, to join with my brethren of the Bar in the testimonial they are about to offer, I felt doubtful whether I could trust myself to say anything upon the subject. The sudden death of a friend and cotemporary of the same profession is not without a disturbing effect upon even young men; how much more disturbing must it be to the mind and emotions of one who has suddenly lost an intimate personal friend and professional cotemporary of more than half a century. I doubted, therefore, whether it would not be best for me to let others express the sentiments which the bereavement excites in the whole Bar, and to let my presence and my known relations to the party be the sufficient expression of my sympathy and perfect concurrence in the strongest declaration of respect and grief which the Bar should think fit to record. But I find it expected of me, as the individual among those present who has longest known and has the most intimately been connected with Mr. Chauncey, to say something of his professional and personal character; and I yield to the expectation, even at the hazard of saying what others may wish had remained unsaid. If this shall

happen, I must beg of the Bar to attribute it to the cause I have referred to.

To some who are present, the early history of Mr. Chauncey may not be as familiarly known as his character and position during later years, and I will, therefore, briefly refer to it.

Mr. Chauncey was a native of the State of Connecticut, and was descended from a line of most respectable ancestors, originally from England. His father, Judge Chauncey, of New Haven, whom I had the pleasure to know, was distinguished for his professional learning and high personal integrity, and was held in great respect to the end of his life. One of his remote ancestors, lineally, I believe, though I am not certain of this, was the Reverend Charles Chauncy,* the second President of Harvard College, Cambridge.† It was a great pleasure to me several years since, to refer my friend, Mr. Chauncey, to a treatise upon "THE BENEVOLENCE OF THE DEITY," written by a descendant of this ancestor, and of the same name; a work which ably reconciles all the moral disorders apparent in the world, with this essential attribute of the Creator, and which manifests the writer's deep reverence for a characteristic so habitually exhibited in the life and manners of my friend.

He was a graduate of Yale College at quite an early age, and was educated for the law and admitted to the Bar in New Haven, in 1798, at which time he could not, I think, have been twenty-one. His removal to this city was determined by the advice of Chief Justice Ellsworth. The selection of the Bar with which Mr. Chauncey should become connected for life was referred, for his opinion, to this eminent man, an old friend of the family, and then Chief Justice of the Supreme Court of the United States; and, without hesitation, he advised Mr. Chauncey to come to Philadelphia. Mr. Chauncey's unnecessary modesty suggested the apprehension that the many men of distinction then at this Bar made his success at it impossible; but Mr. Ellsworth's reply was, that this was the ground of his recommendation. He said it was true that the Bar of Philadelphia was at that time the strongest Bar in the country; but that from this circumstance it would supply the best models, and demand the more study and effort on his part, and that his education and intelligence required nothing but these to carry him to the position he would desire to attain at it.

The advice was highly judicious, and was fortunately adopted. The Bar in this city was certainly at that time a very strong one, and it was natural that it should be so, Philadelphia being then the chief city in the Union, and the seat of the Supreme Court of the United States. The men most distinguished at it were Mr. Lewis, the senior of the Bar, Mr. Ingersoll, the

* The name was formerly so written. † 1654.

two Tilghmans, Mr. Rawle, Mr. Dallas, Mr. Du Ponceau, and Mr. M. Levy,—men of high reputation for learning and great professional talents, and, as a body, exhibiting the finest examples of professional and private honour. It is, indeed, unworthy of any educated young man of talents to select a field for his professional career, for the mere reason that it is at the time unoccupied by men distinguished in their profession, and who may, for some time, hold their position to his exclusion. Such men are the best masters for those who are able and willing to be taught; and the men I have named were remarkable for encouraging every young man who aspired to a place by their side. For both their example and their kindness, I honoured them while they lived, and shall continue to honour their memory while I live myself.

After a few months' attendance in a lawyer's office in this city, to acquaint himself with the local practice, Mr. Chauncey applied, as an Attorney of the Courts in Connecticut, for admission, by comity, as an Attorney of the Common Pleas in this County. But that principle was not then settled; and the President of the Court, the Honourable John D. Coxe, a very learned and excellent Judge, but generally inclined to strict construction, doubted the Court's authority, and deferred an answer to the motion, in such a way as to discourage the applicant. It was an anxious position for Mr. Chauncey, as it seemed to present the alternative of renouncing the Bar of Pennsylvania, or of undergoing a second apprenticeship to the law; but he had the good fortune to have a warm friend as well as an astute one,—and what young man of merit at the Bar had not—in the late Edward Tilghman; and upon his advice, founded either on a more liberal rule in the Common Pleas of Chester, or on the less precise mind of its President, to apply for admission, upon the ground of comity, to the Court of that County. The application was successful, and his admission as an Attorney of the Common Pleas of Chester County, was the title upon which he was admitted to this Bar in January, 1799.

It was at this time, a moment of much interest on his account to his young friends, that I became acquainted with Mr. Chauncey; and from that day, for now more than fifty years, we have stood side by side in the most intimate relations, personal and professional, until death has separated us. I knew him well enough, consequently, to describe him as he was, if I were sufficiently calm and self-possessed to do it. I hope I shall not be thought to exceed or to fall short, in the brief remarks I have to make in regard to such of his qualities as had a particular relation to the Bar.

One of the resolutions which are submitted for your adoption, very expressively describes Mr. Chauncey as having left the recollections of his character upon our hearts, as well as upon our memories; and it is most true. His moral and his intellectual qualities have made their separate as well

as united impression upon us, and I will say a brief word in regard to each.

His good education in the law, together with his sound judgment, regular industry, true fidelity, and inviting amenity of manners, soon removed from before him the impediments which generally retard the advancement of the young members of a crowded Bar. In a rather unusually short time his connexions with merchants and traders in the city were formed for the collection of debts, and for the first transactions of business; and his facility and accuracy brought him enough to sustain him in his preparation for higher concerns. He was a student at all times, even when in most active practice; and he continued all his professional life to be so, and to read up to the latest developments of the science, until he left the Bar. And he did this, not more from his love of the law, than from his conviction that he was thus performing to his clients the duty of an honest lawyer, which was his aim and also his achievement, if it ever was of any man. He consequently became a lawyer, both well grounded and thoroughly instructed, and competent to the accurate investigation and skilful discussion of the whole variety of subjects and questions which arose at the Bar, whatever was their abstruseness or complexity. The powers of his mind were distinguished for their strength and massiveness, perhaps more than for their subtlety; but he never failed to discern and to enforce all that was of practical value to his causes, and to meet with the utmost directness and effect possible, whatever the subtlest intellect might suggest to the disadvantage of his argument.

In his addresses to the Court, nothing could be more direct, perspicuous, and logical. He said nothing for the mere pleasure of speaking; and was generally, therefore, distinguished by a brevity, which left the attention of the Bench as wide awake at the end as it was at the beginning. The cast of his mind was judicial rather than speculative; and if he had accepted a seat on the Bench, he would undoubtedly have left the reputation of an able and learned judge, and I need not say, an example for universal imitation of patient attention and research, of great conscientiousness, and of most perfect urbanity of manners. He was offered high judicial station in this State, at least once to my knowledge; but he thought that a sphere of less public duty was the best for him, especially as it would draw him less from the domestic and social duties, for which he had a special election and preference, to the benefit and comfort of almost as many as knew him.

In his addresses to juries, Mr. Chauncey displayed, in a remarkable degree, the by no means universal faculty of speaking at all times to their perfect apprehension; and after he had become well known, his remarks had the inappreciable advantage of being received under all circumstances as the views of a man whose rectitude of mind made it impossible for him to trifle with the understandings, or to tamper with the prejudices of his

hearers. No one ever knew him,—I may say this with confidence, for I was with him or against him in his causes as much as any other member of the Bar,—no one ever knew him attempt to snatch an advantage for his client by artifice, or to gain his cause by pressing an accidental error of his adversary in the manner of presenting the opposite side. He was a model of honour, truth, and candour, in his whole professional career. If, in the opinion of anybody, he could have fallen short in any case by the nature of his qualities,—I never knew him to fail from such a cause,—it would have been in a case in which the excitement of the hour might have demanded a sharp or bitter philippic against an act of oppression or gross injustice. He felt as much as any man, and expressed, in his own way, his indignation at such wrongs. They were the most remote of all from his toleration. But he had never studied the vocabulary of barbed and stinging words; and his judgment, as well as his temper, induced him to reprove such transgressions with the plainness and moderation that were habitual with him in all things, and which, perhaps, after all, was the best way of dealing with them, both for his client and for the interests of justice. It is better in such cases to fall short than to exceed. I am not able, from my own experience, to say that an advocate derives any advantage from the faculty of giving pain. Mr. Chauncey never gave it in his life, even by accident, without appearing to feel more than he gave.

I must, therefore, represent him as a most successful advocate, as well as a sound, well-read, judicious, and most upright lawyer; and his well-balanced and well-applied powers, both intellectual and moral, had the force and effect to establish him in the profession, after such a lapse of time only, as in comparison with his longer life, may be called short. His venerable father had the happiness to see his success accomplished, before he was called away. The example is of the greatest possible benefit to the younger members of the Bar; for it is an example of the perfect professional success of a man of great modesty and gentleness, advanced to the top of his profession by a sound and judicious mind, by regular industry, by unsullied purity of morals, and by unaffectedly gracious and obliging manners. It is a cause of poignant regret to me that his son did not survive him, to bear his name, and to enjoy and transmit the advantages of such a descent.

What I have thus said of Mr. Chauncey's intellectual and professional merits, every one who hears me knows to be true, without the least colour or exaggeration. I have permitted myself, in the very limited range that is allowed upon these occasions, to express such thoughts only and in such language as are due to a man whose merits were too great to require, and my own sense of them too fixed and sincere to admit of, anything but the unadorned truth. He will live long in our memories, for the intellectual and professional qualities I have imperfectly described.

The impression he has left upon our hearts I must speak of with even more brevity. He was conspicuous through life in all relations, at the Bar, and everywhere else, for his good will to everybody. Many men, it is to be hoped, resemble him in the principle and sentiment, without being so happy in the manifestation of it. But I think he was distinguished from all the men I have known by an habitual and unaffected expression of benevolence. It seemed to be a necessity of his nature that he should not only feel, but also show it, and show it to all and in every way, by his looks, words, and acts. The gentle and gracious smile, the cordial grasp of the hand, the placid attention to all applicants for advice or sympathy, a serene and equal tenor upon all occasions, and active service wherever it could minister either relief or comfort;—these were his characteristics, which all hearts acknowledge; in which, I think, I have never known him equalled, and certainly have never known him surpassed. They also constituted his happiness; for they proceeded from principles of belief, and motives of action, that were ever reproducing in himself the pleasure and the comfort that he was imparting to others, and which secured to him the universal regard and respect of his fellow-citizens. I need not say how highly I estimate my own good fortune, in having lived for more than half a century in the light of this most genial temper.

Such as I have described him he continued to be to the last day of his life. My last interview with him, at Burlington, when I was preparing for a short absence from the city, has left an unfading impression upon me, not only by its conformity in kind expressions to all that had gone before, but by the words of his "farewell," never to be forgotten by me, and which now seem to have been prophetic. But I cannot trust myself to expand the theme. His memory deserves more than I have been able to utter with composure; others will say more, and say it better, but it is impossible for any one to have felt for this excellent man a more sincere respect, or a truer warmth of affection.

The resolutions offered by Mr. Hubbell having been unanimously adopted, the Chairman appointed the following Committee, in accordance with the last resolution: Messrs. Binney, Sergeant, Ingersoll, Hubbell and Judge Kane.

The meeting then adjourned.

ROBERT C. GRIER,
Chairman.

GEORGE M. DALLAS,
Secretary.

DEATH OF HON. JOHN SERGEANT.(A)

AGREEABLY to a call for the purpose, the Bar of Philadelphia met on Friday, the 26th of November, 1852, at 12 o'clock, in the United States

(A) Mr. SERGEANT was born in the year 1779. He was the son of Jonathan Dickinson Sergeant, first Attorney-General of the State of Pennsylvania. He received his primary education in the schools of the University of Pennsylvania. In the spring of 1794 he went to Princeton College, where he graduated in September, 1795. After a short time spent in a mercantile counting-house, he began the study of the law in March, 1797, in the office of the late Jared Ingersoll, and was admitted to the bar in July, 1799, at the age of nineteen years and seven months. In 1800, soon after the first election of Governor M'Kean, he was appointed to prosecute for the Commonwealth in Chester county, and during that and several subsequent years he prosecuted also in Philadelphia county, and occasionally in the Mayor's Court of the city of Philadelphia. In 1802, he was appointed by Mr. Jefferson a Commissioner of Bankrupts. In 1805, he was elected a member of the House of Representatives of Pennsylvania, for the city of Philadelphia. In 1806, the office of "Recorder of the city of Philadelphia," was tendered to him by Governor M'Kean, but he declined it. That office had been successively held by Mr. Wilcocks and Mr. Dallas, immediately before the offer which has been referred to. Having declined a re-election in 1806, he was again in 1807 elected to the legislature. During the session of 1807–8, he was chairman of the Committee on "Roads and Inland Navigation," and in that capacity reported the first act giving the direct aid of the State to internal improvements. In 1815, he was elected to Congress by the district composed of the city and county of Philadelphia and county of Delaware. He was elected from the same district to the three following Congresses—the last time in 1820, without opposition; and at the end of that term he declined a re-election, and devoted himself again exclusively to his private avocations. In 1826, Mr. Sergeant was appointed by President Adams Minister from the United States, to what was commonly called the Congress of Panama, which was expected to meet at Tacubaya, in Mexico, and to be composed of plenipotentiaries from the various States of North and South America. The disturbances in South America about that time prevented the assembling of the Congress, and he returned to the United States in July, 1827. In the following October, he was sent to Congress by the city of Philadelphia, where he staid for one year, and then retired again to private life. In 1832, he was taken up by the Whig party of the United States as its candidate for the Vice-Presidency; Mr. Henry Clay being candidate for the Presidency on the same ticket. In 1837, he was elected by the city of Philadelphia a member of the Convention to reform the Constitution of Pennsylvania, of which body he was by it elected president. In 1840, Mr. Sergeant was again elected to Congress, from which he retired in the year 1841.

Circuit Court room, to express their sense of the severe bereavement sustained by them in the death of the Hon. JOHN SERGEANT. The Hon. George M. Dallas called the assemblage to order; and, on his motion, the Hon. John Bannister Gibson was called to the chair, and George M. Wharton and Peter M'Call, Esqrs., were appointed Secretaries.

The Hon. Wm. M. Meredith then rose, and in the following terms introduced a series of resolutions:

Mr. CHAIRMAN: Before offering the resolutions which I am about to propose for the adoption of the Bar on the death of John Sergeant, I desire to state that they go beyond the tokens of respect and regret usual on similar occasions. On the loss of an associate of greatly more than ordinary merit, it is becoming that there should be an expression of something more than ordinary sensibility.

Mr. Sergeant was born in this city, and lived here for seventy-three years, during fifty-three of which he was, as an advocate and counsellor, one of the ministers of justice. He has been known and honoured for half a century, and in ability, in learning, in integrity, in liberal fairness, and in habitual courtesy, he has maintained the reputation of the Bar of Philadelphia, and supported the inherent dignity of the profession.

In speaking of a few of the more prominent points of his character I shall but give a voice to the feelings and opinions of all who surround me, among whom are included friends of his youth, associates of his manhood, and reverers of his age. Earnest and convincing as an advocate, he was wise and faithful as a counsellor, and remarkable as a lawyer for comprehension, vigorous and clear intelligence, for patience of investigation and force of argument. Truth, directness, and fidelity pervaded his character.

Immersed throughout life in great professional concerns, he found time to

---

On General Harrison's election to the office of President of the United States, he was tendered a place in the Cabinet, but refused the offer; and shortly afterwards declined the appointment by Vice-President Tyler to the mission to Great Britain; as he did also the seat on the Bench of the Supreme Court of the United States, then recently vacated by the death of Judge Baldwin. His last public official function was fulfilled in 1847, when he was selected on the part of the United States by Mr. Marcy, Secretary of War, as an arbitrator to determine the controversy then existing between the United States and persons claiming under the State of New Jersey, as to the Pea Patch Island, which was settled by his award. His last appearance in public was to preside at a great meeting held in Philadelphia in 1851, to express the sentiments of the citizens of Philadelphia, without regard to party, on the preservation of the Union, then seriously menaced by controversies respecting slavery.

He acted as President of the "House of Refuge," from the date of its establishment; was also President of the "Apprentices' Library Company;" and for many years there was in this city scarcely a meeting for any worthy public object, to which he was not invited; and none which, when invited, he refused, if able, to attend. During all this term he was engaged laboriously in the duties of his profession. He died November 23d, 1852, in the 73d year of his age.

perform, with uncommon interest and ability, the duties that devolved on him as a citizen. His countenance, his wealth, his aid, his active and energetic exertions, by word and deed, were given with devotion and effect to the support of all the primary interests of society; to every effort to uphold the cause of morals and order, or advance the progress of learning; or establish in permanent institutions the interests of humanity and justice.

On the larger stage of public duty, on which his career was long and his position conspicuous, he was always faithful to his country—never neutral in his feelings—always decided in the expression of his opinions. Often involved in the political heats of the hour, his earnest sincerity and manly frankness, while they conciliated the attachment of his political friends, commanded at all times the respect of those who differed from him most widely and most warmly in sentiment.

He who was so mindful of his duties towards man could not well be otherwise than humble and true in his fidelity to the Almighty. He fulfilled his duties to society by the example of regular attendance on public worship, and lived and died as became a sincere and pious Christian. Therefore his age was pleasant and tranquil, and his death full of peace, and therefore he is mourned by the friends to whom he was endeared, by the profession which he adorned, by the community which he benefited, and regretted by every citizen of our common country who is capable of appreciating private virtue and public service.

Sir, it becomes us, the members of the Bar of Philadelphia, who have enjoyed the advantage of the bright example during his life, to strengthen and extend its influence by the honours which we pay to his memory. I therefore move the following resolutions:

Resolved, That we lament the bereavement which this profession sustains in the death of John Sergeant, who for so many years had made part of its distinction and pride, and who, throughout his long and active career, has been eminent, not more for his abilities than his virtues, and is worthy of admiration, not more for his great devotion to his client, than for his fidelity to justice and the law.

Resolved, That we honour the sense of moral responsibility and the spirit of diffusive benevolence, by which our late fellow-citizen was so usefully connected with this community at large, which led him constantly to look beyond the possession of talents, to a comprehensive and beneficent use of them; and while serving individual interests and justice in the unremitted labours of a long and active and most useful professional career, animated his efforts in every cause of social and public improvement.

Resolved, That the members of this Bar will assemble in this place half an hour before the time which shall be appointed for his funeral, that they may pay to his memory the respect of attending it in a body.

Resolved, That a Committee of nine persons, to whom the Chairman and Secretaries are requested to associate themselves, be appointed by the Chairman, to convey to the family of Mr. Sergeant a copy of these resolutions, as an expression of sympathy in their great and irreparable bereavement. And that, as a further token of respect to his character, the proceedings of this meeting be published in the papers of this city, in the National Intelligencer at Washington, and, with leave of the Supreme Court of this State and the Circuit Court of the United States, be inserted as an obituary in the next volume of their printed decisions.

The resolutions were seconded by Mr. BINNEY, who spoke as follows:

MR. CHAIRMAN AND GENTLEMEN OF THE BAR: I concur in these resolutions. I approve and second them with my whole heart, warmly and sincerely. They are beyond the common scope, as Mr. Meredith has remarked, and therefore I approve of them. I do not do this as a ceremony, or in mere conformity with the custom which has grown up at this Bar within the last thirty years, the custom of making some offering or tribute to every member of the Bar that departs this life. The usage proceeds unquestionably from an amiable source, but I have never been able entirely to approve of it. It impairs the expression of spontaneousness, cordiality, and sincerity, which every such commemoration ought to have, and must have, to be of any value. The death of Mr. Sergeant, if there had been no such custom, would have brought this Bar together by an instantaneous and irrepressible emotion. They would have offered him these resolutions with one mind and one heart, and would have adopted them with one unanimous voice. I exclude from my mind all influence of the custom, which, in ordinary cases, is taken by the world as a formality, and produces a bad rather than a good effect. I yield to the influence and impulse of the occasion and second these resolutions with my whole heart. I am sure they will be adopted by the Bar with the same feeling, and with entire unanimity.

I might, indeed, Mr. Chairman, spare myself the pain of saying any more, and you the trouble of hearing it, after having listened to these resolutions, which comprehensively, as well as specifically, draw the character of Mr. Sergeant, in its breadth, in its depth, and in its highest import. But I know what is expected of me, however painful it is for me to meet the demand. I know what is expected of me as his friend and cotemporary. I know that it is expected of me to dwell, not in general terms of eulogy upon his character, but upon some of his personal characteristics, which have been exhibited to me in the course of a very long and intimate association with him. You expect, from my long acquaintance with him, from our constant association for so many years, that some points of his character, some characteristics of his mind, which have struck me, and were not always so discernible in

the public demonstrations that he gave, should be made known to you. It is only for the purpose of adverting to these particulars that I ask your attention for a few moments.

Mr. Sergeant began, continued, and ended his adult life in the presence of some of the persons who are now in this audience. Its outset, you either know or have heard, was without censure, or reproach, or the shadow of either. His was an honourable and virtuous youth. And he continued from year to year, during his whole life, increasing his titles to respect and honour every day, until he achieved the highest degrees of both—as wise men estimate degrees of honour and respect—by merit, and not by accident, or fortune, or the breath of popular applause. He has rounded the whole circle of his life, fully, completely, perfectly. He has descended to his rest with the mild serenity and beauty of the setting sun, after a course as uninterrupted and regular as the annual movement of the earth itself round that orb. He has more than lived out what the Psalmist calls "the days of our age." He has escaped the "labour and sorrow" that are foreboded to the strength that attains "fourscore;" and now from henceforth, by the necessity which makes the past unchangeable, there is to be no decline nor decay in his bright example. I regard Mr. Sergeant as a fortunate man.

I have said, Mr. Chairman, that his adult life was begun, continued, and ended in the presence of living witnesses that are before me. Most of you have seen a part of it. Some of you have seen a considerable part of it. There is one, and perhaps only one, who has seen the whole of it, and he is not the calmest to speak of it, nor the fittest to judge of it; and, it may be, is the least competent to represent it as it ought to be represented. But, as I have known him long, and known him well, with an intimacy that was never surpassed between two men, it is my duty to exhibit my impression of it as it remains and ever will remain with me, as clearly as I can.

I knew him well; I respected him truly; I honoured him faithfully. I honoured and respected him to the end of his life. I shall honour and respect his memory to the end of my own. No trivial incongruities of feeling or opinion,—no misinterpretations however arising,—no petty gust,—no cloud of a hand's breadth, which may and will chill or overcast the common sky of the truest friends in a life of fifty-five years, ever for a single instant disturbed the foundations of my regard for him, or even reached the depths in which they were laid. These foundations were laid upon his principles, as I well knew them fifty years ago. They were laid deep upon that sure basis; and they were beyond the reach of change or chance, as his principles were.

Mr. Sergeant and myself were fellow-students in the office of the late Jared Ingersoll—a name that I can never mention without the profoundest veneration, as my master and guide in the law,—and it was the good fortune of both Mr. Sergeant and myself to be raised under the eye of such a man,

at such a time. It may not be known to the present age, but it is an indisputable fact, that in that venerable man's person there were almost two distinct natures, of different qualities, though both of them excellent; his nature in reflection and his nature in action. In reflection, he was, or appeared to be, rather slow, uncertain, deliberate—poising and balancing thought against thought, and authority against authority, as if he did not wish to approach the conclusion; and the consequence of it, I believe, was, that while he was generally, and for the most part right, if he ever was otherwise it was because the truth of the conclusion was hurt by the slowness of the process. This was one nature. But when he came into action, he was the most clear, decided, bold, acute, far-sighted man, that I have ever seen in my life, as it regarded all the purposes of his cause; and he sprang to his conclusion instantly and fearlessly, as if he came to it by inspiration. In both of these natures, however different in their character, he was a fine example to the students in his office, whom he permitted to know him, and to trace, as it were, the steps of his mind even in its coldest operations; and often did we hear him, through the glass door of his office on the other side of the way, treading his regular steps across the floor, and soliloquizing the points of an opinion or a cause, for the purpose of giving himself the stimulus which he felt that he required. When he got before a jury, he was the most dangerous adversary that any gentleman could meet. In my perhaps partial opinion, he was the ablest advocate of the Bar before a jury, when he was in his prime and vigour, whether his cause was good or bad; and before the Court also, if his cause was good, or probably so.

Mr. Sergeant was admitted into Mr. Ingersoll's office some few, perhaps half a dozen, months before me. We were of the same age within a short month. He was admitted to the Bar a term in advance of me; he in December, 1799, and myself in the following March.

In Mr. Ingersoll's office Mr. Sergeant was a faithful student—addicted to little pleasure—social, cheerful, and gay, with the friends whom he preferred; and giving to myself, without stint, all the leisure time he had, by night and by day, for the purpose of refreshment, or of mutual benefit, in the course of our studies. He had at that time, what all have since observed, an extraordinary quickness of thought, and an equally extraordinary grasp or comprehension of the thought or argument that was opposed to him. Whatever he studied, he knew well; and, when he left the office, was as accomplished a student as ever was admitted to the Bar. Mr. Ingersoll's opinion of him was such, that I recollect, upon one occasion, when I went to the master to solve a point which my ignorance had not comprehended, that he said to me, "Go to Mr. Sergeant: he has been over that, and he can tell you, if anybody can." I accordingly went to him, and he told me. This remarkable power of Mr. Sergeant, his quickness of thought, and grasp

of comprehension of whatever was submitted to him, either on the same side or against him, you must have been familiar with. I saw it in its bud; you have seen it in its development. It was the same flower more fully developed, but having, from the strength of my first impression, no more freshness or beauty to me at any hour than when I saw it in its opening. He had, with this most striking and available faculty, another that was peculiar to him. He manifested more of it when he was young and in middle life, than he afterwards thought fit to use; because, perhaps, there were at times some inconveniences arising from it. But I state it, as it will serve to show the character of his mind. He had the faculty of condensing in an adage, or in a colloquial expression, drawn from the mother-wit and humour of the people, an answer to a proposition that he rejected, which at least took out of the argument all the affectation it may have had, if it did not effectually overthrow it. At times this faculty was peculiarly effective with the jury; and it often cut as deeply into the adversary as it did into his argument. But with the increasing elevation of his walk, and the full ascertainment of his strength, he made a more sparing use of it.

In addition to his quickness, grasp of thought, and power of comprehension, he derived, through an excellent education, the art of arranging his argument with perfect skill, according to the rules of the most effective logic; and he was able to penetrate the want of it in anybody that was opposed to him. He never split hairs. He never confused his premises and conclusion, by blending them together or involving them in any way; and he never permitted any one to do it against him; and he marched to his conclusion by a path or paths that he was willing to let every body trace and examine after he had completed the passage; and it was not safe for any man to do otherwise with him.

His first striking success at the Bar you all remember, or will remember it, when I state that it was in the case of *Bender* v. *Fromberger*, in 1806. I need not say what that case was. As often as I have thought of it, and of its effect upon him, I have thought as any person acquainted with the case and counsel will think, when he refers to *Ackroyd and Smithson*, in Lord Campbell's Life of Lord Eldon. It settled his position at the Bar—it settled it with the Court; for though, after gaining the cause upon matter of pleading, and gaining also one of the points, and an important one, upon the merits—that of the return of the purchase-money, with interest, upon a covenant of general warranty—he lost it upon the other, that is to say, the claim to indemnity to the value of the improvements, yet he gained more than he had lost in the compliment that was paid him from the Bench, and is introduced into the report, that, if any argument would have shaken the opinion of the judge, it would have been Mr. Sergeant's. This was fully equivalent to what Dunning said to Mr. Scott, when he rose to support a

case at the assizes in opposition to *Ackroyd and Smithson*. "Sit down, Mr. Scott, I will not hear you. Are you not the Mr. Scott that argued the case of *Ackroyd and Smithson?*" Mr. Scott said that he did argue it. "Then, sir, I will not hear you. I have read your argument in that case, and I defy you, or any man in England to answer it."

Mr. Sergeant, I need not say, advanced from that time, steadily and uninterruptedly, until he came to the position that he finally held. His progress was more rapid than that of some of his cotemporaries; but at length they approached nearly to his position; and it was from being concerned myself frequently on the same side with him, that I came at length to know the peculiar habits of his mind, to which, perhaps, some of the Bar may be strangers. Any man, in any position, at that time could know what his powers were. No man could so well know as myself the manner in which he brought his powers into action.

I have said that he was quick, comprehensive, logical. His mind was, moreover, altogether of a suggestive character. He did not like to read, for the purpose of thinking; he thought, for the purpose of reading, to corroborate or to rectify his thoughts. Whether that would be the better way with minds less suggestive than his own, is more than I can say. It was his striking way; and while sometimes it exposed him to inconvenience, at other times it gave him a sort of electric power, that was altogether marvellous. He was not, according to my impression, the best in consultation with his colleague. He would think—(and that was his delight,)—he would suggest, and he would reason; but it was in a manner comparatively cold, and without approaching the true bearing either of the authorities or of the case. He always had this preference to the last day of his professional life; for I have witnessed it not many years before its conclusion. Whenever I was concerned with him, I certainly relieved him from all the practical inconveniences of it. I relieved him, except upon one occasion, when, unfortunately and unexpectedly, the whole burden of an important cause was thrown upon himself. But, then, as I understood, he raised himself up from under the whole weight, and cast it upon the opposite side with extraordinary effect, by the defensive exercise of his speculative power, to gain the time that was necessary for the more precise consideration of the case, and the authorities bearing upon it. I refer to the case of the Lessee of *Livingston* v. *Moore*.

Upon that occasion, Mr. Sergeant and myself being together, this sort of adaptation of one to the other, was perfectly well known and understood between us. The preparation of the case and general bearings of it were left to me, and he gave himself no further concern. He thought of it generally; he had the general principles of the law in his mind; he had suggested various matters, and in fine, all the work that his mind had to do was done; but everybody knows that it is not the mind alone that must work at the

Bar, to work effectually. The cause was called on when Judge Hopkinson sat in that chair where Mr. Justice Gibson now sits. It was a cause of vast magnitude. It was a cause of great public interest. It was the Nicholson case; and the day before it came on, I was stretched upon my bed with an acute inflammatory attack, which entirely disabled me. He sent for my eldest son, and asked what he should do. He made his motion to the Court the next day for a continuance of the cause, in consequence of my illness; but there being another counsel engaged on the same side, the Court refused his motion, and quite properly, too. Mr. Sergeant was, then, to go into that cause without the aid of a pioneer, trusting to what the preceding counsel, who was from the country, could furnish. That counsel had worked for his own mind, but not for Mr. Sergeant's. After he had spoken some forty minutes to the cause, and had said all that he thought material, but which was not all that was material for the cause, nor for Mr. Sergeant, who was to follow him, he said that no man of understanding would detain the Court by speaking for a longer period in such a cause than three-quarters of an hour. There was the predicament; and how did he relieve himself from it? You know the discursive character of his reasoning when he thought it necessary. You know the manner in which his pregnant mind would throw off suggestion after suggestion, always connected more or less with the subject, having the due character and order of ratiocination, tending apparently to the conclusion, even when he saw himself that it was something wide of it. This was his defensive speech against the order of the judge; and, after he had talked the clock down, he went into his office, and on the next morning —how much of the night he gave to it I do not know, not less than the whole, if it were a short summer night—he came into Court, and, as I understood from those who witnessed it, made a most clear, effective, and decisive effort, which gained the cause. During the session afterwards, we argued the same cause together at Washington, with the same success. This was the character of his mind. When the burden rested upon himself, he prepared his causes well; but when he had his choice, it was the delight of his mind to think, speculate, to suggest, and to leave to another mind the work of more precise preparation.

I need not say what was the extent of his learning, or the effectiveness with which he handled every cause that was submitted to him; you have been the witnesses of that. But I may speak of what were the moral qualities of the man during his whole career at the Bar. His honour and integrity in all that regarded the profession or the management of his cause, were not only above impeachment or imputation, but beyond the thought of it. So distinct and universal was this impression, that if any man had directed a battery of that sort against him, the recoil would have prostrated him to the earth. His heart, his mind, his principles, his conscience, his

bond to man, and his bond to Heaven, which he had given early, and which, to the last, he never intentionally violated, would have made it, humanly speaking, impossible to him to swerve from his integrity. It is the best example for the rising generation to have before them. He was perfectly fair. There was no evasion, no stratagem, no surprisal, no invocation of prejudice, no appeal to unworthy passions; he was above, far above, all this. Mr. Sergeant had too much strength, indeed, to make use of such arts, to say nothing of his virtue. He was charitable in doing work at the Bar without pecuniary compensation, though not without reward; he had that which in his judgment was the best. But he did not do it ostentatiously. He did not do it by proclamation, informing the Court in the presence of the bystanders that he had not received a fee, but that it would make no difference with him. He never let his left hand know what his right hand did. Still less did he ever impose upon the left hand of others, by informing them of what his right hand had not done. He was in every respect internally, in the heart, a most kind man. I do not mean that he was kind by routine—kind by ceremonial courtesy. I mean that he was kind in principle, and kind in the affections of his heart. Mr. Sergeant was a man of a most refined, delicate, and susceptible organization. His instincts, quicker than his thoughts, would perceive, or think they perceived, the appearance of a disposition to assail or wound him personally; and he would sometimes repel and retort the injury or the sting, where there was no intention of either the one or the other. But he was placable, and not self-excusing. When the delicate tissue of his nerves was smoothed and quieted down, and the language of the heart came forth, it was not only clear and plain, but the very countenance with which he expressed it was both attractive and seductive. It drew you more completely to him, and more away from yourself. His best friends knew this quality, and that it was the accompaniment of a sensitive and rather susceptible nature, and it never diminished their regard for him.

Having spoken of his manners at the Bar, and the example he gave to the Bar, I ought to speak of the range of his mind, as the conclusion of the whole matter. The range of Mr. Sergeant's mind was just as wide as the whole circle of his professional necessities. He knew the bearings of every part of the law, although he had not penetrated into every nook and corner of it. But he could draw his resources from every part with equal ease, when it was necessary. And it was often a matter of doubt in my own mind with what branch of the law he was most conversant. He had acquired an early training in criminal law, and in that he not only went before his cotemporaries, but he stood on one side of them, walking a different line. He was, of course, generally accomplished, as you may judge from what I have said. But if he had any predilection—and I think he had—the dis-

cursiveness of his mind inclined him to such questions as would not fetter him by the chains of authority, but would suffer him to choose for himself the path in which his own suggestive powers could work freely. Upon more than one occasion he rose to the highest degree of excellence in the class of constitutional questions. They were the best suited to him. But he worked with ease and vigour in many fields. It was not altogether so with our predecessors at this Bar. Although they were all competent, able, and effective men, there was a marked difference in them in respect to their particular excellence. Mr. Lewis was the crown lawyer—the criminal lawyer by way of eminence. Mr. Edward Tilghman was the lawyer for estates and tenures, devises and remainders. Mr. Ingersoll, Mr. Dallas, and Mr. Rawle were most able advocates, and more able than others in commercial law.. And Mr. Du Ponceau was the prime leader in maritime and public law. At that time the preference was given by all of them to the leader in that particular branch upon which the case might depend. In modern times, I believe this practice is forgotten and passed away. General finish and accomplishment prevail, and there is no one now can claim to himself a prominent ability in any particular branch. So much for Mr. Sergeant's professional character and professional life.

In early life he had a decided attraction to politics and to political position. He left two of his cotemporaries in making that selection, and he was gratified to the extent of his wishes by employments in public life, frequently and generally, from the year 1805 to 1837; from 1805, when he was just known at the Bar, to 1837, when he was at the head of the Bar, and also at the same time at the head of the Convention for reforming the Constitution of the State. He had affinities for public and political questions, and felt a strong attraction to the incidents of public life. How nobly he maintained himself afterwards; how truly he proved his qualifications for the position; with what fine manners, pure morality, personal dignity, and exalted talents he sustained himself there; how extensively and constantly he gratified the pride of his constituents; what great profit accrued from his services to the city, the State, and the country; and how faithfully and strenuously he asserted the authority of the Constitution, and of the whole Constitution, I need not tell you. It was all a virtuous delight to him. He loved the stirring debate, the sympathetic combinations of men, the excitement, the agitation, the hopes, and the very fears of the pending issue, and the triumph of victory; and defeat was no depression to him, nor did it bring the least despondency. Nothing prevented him from immediately rallying with new tactics and new vigour for another campaign. I witnessed and sympathized with his delight, and he often spoke of it. But Mr. Sergeant was not a man of affectation; he had not a particle of it in his nature. He was himself *totus atque teres*, as to all his duties, private, professional, and public. He

reconciled every one of them with the others, and with as much ability as any man I ever knew. He reconciled all his public life with his professional life, and carried on a regular and extensive practice in the courts, while he held one of the highest positions in Congress. I personally knew that he never lost sight of them; and, if he had, he knew that, in that sincerity which was the bond of our common intercourse, he would have received, and would have expected to receive, an admonitory suggestion from myself. When he was offered the mission to Panama, he consulted me in reference to it; for we were in a professional relation in important causes—one particularly—that if I had thought it had been wrong, he would have thought it a desertion, and would have declined the appointment. He told me that he was prepared to do so. I told him to go, and that I should be happy in bearing any portion of the burden in his absence. He afterwards consulted me in regard to a mission to England, which, if my memory serves me, was a mission anterior to that which is said(A) to have been offered him by General Taylor. He wrote me a letter from Washington, asking me what I thought of it in all its relations; and I wrote to him, that if he could go to England, and afterwards leave the mission without returning to the Bar, he ought to do so; but if he could not, that he ought not to go; and he refused it. He was a man who would never sacrifice to public life his private or contracted duties, in such times as we have lived in. He was a man of too much discernment, and knew too well the state of things in which we live, to have made a sacrifice there which would have involved a larger sacrifice elsewhere. He was, no one can doubt, possessed of a deep love of country, of patriotism in its highest sense, of the desire of extensive usefulness; but he never thought, and it would be gross injustice for any one to think, that a deep love of country, patriotism, and a desire of extensive usefulness, cannot consist with a devotion to the concerns of private and professional life, and the rejection of public service. He never spoke of his public life as a sacrifice, nor was it so: still less did he speak or think of professional life, or any form of useful private life, as being a selfish seclusion. He had too much sense, reason, and justice for that. He would not surrender to rebuke, in that way, the friends that were by his side, and were never from his side. If this is a defensive word, let me remark that it is on behalf of the dead, rather than the living. In all points of his character, Mr. Chairman, in all positions that he took, in all the manifestations of his mind, he was open, sincere, consistent, and faithful to that main principle within him, that he was bound, and ever bound, to all that he had assumed towards his friends, and towards his own family. That it takes an iota from his praise, no one can suppose.

(A) Perhaps inaccurately.

Mr. Chairman, I have gone over Mr. Sergeant's life, or parts of it, with as much detail as I can trust myself with, at such a meeting, and at such a time. I have endeavoured to forget my own feelings, by going, more than is common on such occasions, into matters that were professional, and that have a general reference to his intellectual power and tastes. It has been a relief to myself, and, I hope, not uninteresting nor unprofitable to you.

Of Mr. Sergeant's relations to his family I need not speak—I cannot speak. While the artery of domestic love is bleeding, as theirs must now bleed, I have no skill to bind it up—no styptic to staunch it. They have the deep, the most deep and sincere sympathy of the bar and of the public. They have higher and better consolations than this. They have *his* example, *his* teaching, *his* personal prescription for himself. They will look to all that, and that is all they can or need look to. They will look to God, the Saviour, and find the relief which he found. They will take hold of the staff that supported *him*, and it will support them. There is no other cure, there is no other relief for such a wound.

Mr. Chairman, and Gentlemen of the Bar, it has pleased God that I should survive my two cotemporaries of more than half a century—Charles Chauncey and John Sergeant. From the tenacity with which most men hold to life, such a survivorship may seem to be desirable; but it is not wisely desirable by any man, for it cannot be reverently asked of Heaven. Mr. Webster, in his beautiful letter to his old schoolmaster, Mr. Tappan, has himself said to this effect: Master Tappan, we may ask that God's kingdom may come and be universally established upon earth; we may pray that His will may be done by us and by all men; we may ask for our daily bread; we may pray for forgiveness of sins, for escape from the snares of temptation, and for deliverance from evil; but beyond this, we hardly know for what good to supplicate the Divine mercy. Doubtless Mr. Webster thought that a prayer for *wisdom* was included in our Lord's prayer; and so it is; but we may ask directly and expressly for wisdom, and if to the granted prayer there shall be added length of days, the prayer will consecrate the gift, and it will be safe. But we may not ask for length of days. We ought not to ask it. Old age has its pains, its disappointments, its mortifications, and its evils; and unless the Divine Wisdom shall overshadow and crown us, the boon we ask may make that age worse than the "labour and sorrow" which the Psalmist foreshadows for it. Ask it not. Ask for wisdom, and length of days may be granted, if it is in the pleasure of God. But ask not for length of days.

It has been my most grateful, most painful duty to declare to this Bar, upon two occasions, the impressions that have been left upon me by the death of these two eminent men. Let no man envy me the task, however great the satisfaction may be, in short retrospect to myself. Henceforth no

such duty remains to me. I have uttered the last words at a Bar meeting upon the departure of friends. I have probably uttered my final words to the Bar of Philadelphia, except the expression of my most cordial regards, and my most affectionate salutations to you all.

Mr. Dallas then said:

MR. CHAIRMAN AND GENTLEMEN OF THE BAR: It is impossible that any one person can really desire to hear a single word added to what has already been said, so beautifully and impressively. There lives no man on the face of the earth so competent to appreciate the character and virtues of John Sergeant, as the man who has just finished speaking. From early life, throughout a period exceeding one half a century, his opportunities of scrutinizing the qualities of the deceased have been unceasing, and the capacity to do so has been equal to the eminence of those qualities. Mr. Chairman, reiterating the remark of an Athenian sage, we have been told that Mr. Sergeant has been fortunate. Of the happiness or fortune of men it is impossible to speak until they are dead. But, perhaps, as the members of a numerous bar, we should be able to say that, independent of his uniformly excellent and unblemished life, Mr. Sergeant was fortunate and happy in other and most material circumstances. He was fortunate and happy in his associations at the Bar. Throughout the fifty years of active, energetic life here, who was on his right and who on his left? With what minds did he come in conflict? What examples of excellence had he before him? He was fortunate there. But of all pieces of good fortune, there is one thing that will address itself now strongly to the consideration of every gentleman present. He is fortunate in having the praises just poured upon him, coming from such a source. I do not, therefore, sir, wonder at the truth of the proposition with which I started—that there cannot be a single individual present that would wish to the effective, powerful address we have just heard one word added as homage to the memory of Mr. Sergeant. It is complete in itself.

After some other remarks by the Hon. C. J. Ingersoll, the resolutions offered by Mr. Meredith having been unanimously adopted—

The Chairman appointed the following committee in accordance with the last resolution: Messrs. Binney, Dallas, Meredith, James S. Smith, H. J. Williams, T. I. Wharton, J. M. Scott, E. K. Price, and E. D. Ingraham.

The meeting then adjourned.

JOHN BANNISTER GIBSON,
Chairman.

GEO. M. WHARTON,
P. MCCALL,
Secretaries.

CASES IN THE THIRD CIRCUIT, &c.

KREBS V. DIRECTORS OF THE CARLISLE BANK.

[BANK: EQUITY BETWEEN PARTNERS OR STOCKHOLDERS.]

Where stockholders in a bank, whose charter gives them a *right*, but does not *oblige* them to pay in full, the price of stock subscribed, pay, some of them in full, and some but in part, and the bank goes into liquidation from a loss sufficiently partial to allow such a rule: the stockholders who have paid in full have a right to a return of the excess paid by them above the others, who have paid but in part, before any division of its balance takes place. This balance is then to be divided (after deducting the loss) rateably among the stockholders. And this, though the bank has been in operation for many years, making dividends of profits in proportion to the amounts paid in.

Exemp. Gr. A. B. and C. each subscribe, in 1814, to the stock of a bank, whose shares are $50, to be paid as the Bank Board shall direct. In 1817 the Board *directs*, that all the stockholders pay $30 a share; and *allows* them to pay part, or all the balance. B. pays $10 of the balance, and A. $20—the whole balance; so that A. has paid in all $50, B. $40, and C. $30. The bank makes semi-annual dividends on profits till 1845, when, having $200,000 of its allowed capital paid in, it meets with a loss of $50,000, and goes into liquidation. A. is entitled to receive $10 on his share, before B. receives any thing. And A. is entitled to $10 more on his share, and B. $10 on his share, before C. receives any thing: and then, the loss being deducted, they are to receive rateably.

Ap'l Sessions, 1850.

THE Carlisle Bank, in Pennsylvania, was incorporated in 1814;* its capital was "not to exceed $300,000," and was divided into 6000 *shares, of* $50 *each*. In organizing it, the different persons who took stock signed an agreement, directed by the act

*Act of Assembly of Pennsylvania, 21st March, 1814.

Ap'l Sessions, 1850.

Statement.

of incorporation, by which they "agree to pay to the President, Directors, &c., the sum of $50 *for each share of stock set* opposite to their names, *in such manner and proportions as shall be determined by the Board of Directors*," *&c.* Five dollars a share, was paid at the time of subscribing; and certificates of stock issued to the different subscribers, "*subject, however, to all the payments due or to grow due thereon.*" 'Calls' or requirements for additional instalments of $5 each, were made at five several times, between the organization of the bank in June, 1814, and December, 1817. But the Board never *required* any of the stockholders to pay any instalment beyond the sixth, and some of them did not even comply fully with the 'calls.' Some, however, paid not only all the instalments asked for, ($30), but paid also, without any request, the remaining $20, which was the full price of the shares.

On the 8th of April, 1828, the Board "resolved, that the cashier be authorized to give notice to the stockholders, that the bank will receive any further payments they may *wish to* make, until the 1st of January, 1829." There was no evidence that this notice was generally given. Several stockholders, however, now paid in different sums; some in full; some not so. These payments were made as well after, as before the 1st of January, 1829, the limit fixed by the resolution. At another stated meeting in June, 1829, the members present being unanimously of opinion, that the '*privilege*' of paying in full "*is promotive of the interests of the bank*," extended the time, until it should be otherwise directed. No general notice appeared to have been given of this resolution, any more than of that of the 8th of

April preceding. But several additional shares were now paid in full, and some paid to different amounts above the $30 previously *required.*

The bank was in operation, from 1814 till 1845, and was employed in the usual business of banking. During this term fifty-eight dividends were made, averaging a fraction over 6 per cent. per annum (the legal rate of interest in Pennsylvania) *upon the different amounts paid in.*

In May, 1836, about two-thirds (or $200,000) of the capital limit being paid in, and the bank having a considerable amount of inactive funds, it made a large purchase of United States Bank shares. A loss of about $50,000 followed, and the Carlisle Bank having resolved to wind up its affairs, a question arose between the different stockholders, as to the manner in which the assets were to be divided; whether for example, A. who had paid $50 per share was to receive $10 per share on each of his shares before B. who had paid but $40 per share should receive anything; and whether A. was to receive $10 more, and B. $10 on each of his shares before C. who had paid but $30 per share, should receive anything? Or whether the capital after deducting losses was to be divided between A., B., and C. *pro rata,* or in proportion to the amount of money invested by them respectively in the stock of the bank?

The directors, acting under an opinion of Mr. Binney, thought the former the proper way; and several actions having been brought against them by dissatisfied stockholders, in the local courts, Krebs, a stockholder, who had paid in full; now, "in his own name as well as in the names and behalf of such other persons, stockholders, &c., as shall come in and

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become parties hereto and contribute to the expenses of the same," brought this suit—a bill in equity, with a view to have a decree "which should at once bind and conclude all the stockholders, and protect the institution" from further vexation.

For the dissatisfied stockholders.

Mr. *Frederick Watts*, for the dissatisfied stockholders. In organizing the bank, a contract was made the basis of everything, and is the expression of every one's obligation; the expression not only of the obligation of all to the bank, but also of each subscriber to every other subscriber. The stockholders agree then with the bank and with each other to pay "in such manner and proportions" as the board shall "determine." This is an agreement to pay in no other way. It is conceded that the board, whose duty it was to determine everything in the matter, never "determined" that any one should pay beyond the $30 called for; while they did 'determine' that all should pay to that amount. That, then, is the whole, absolute and exclusive determination in the matter; and measures the whole obligation in the matter. What, then, the over-paying stockholders have done, was a voluntary act of their own; done prior to 1828, in an irregular way, by a private assent of the receiving clerk, and never done at any time in a way that was regular. The over-paying stockholders, profiting by what they deemed a 'privilege,' put in their money. For the long term of thirty years it has been a privilege: and they have enjoyed the profits of it; profits which have been above the rate of legal interest, and much above what in fact could have been had continuously through a term of so many years. Whether great or small,

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For the dissatisfied stockholders.

however, is not important. They had their chance. Suppose the bank was going on. Would not this loss be shared rateably? Why is the liquidation to change the equity? Suppose, even liquidating as we are, that the speculation had proved a profit. Would not the profit be shared rateably? Again we ask, why or how is the liquidation to change the thing? If the whole capital paid in, had been exactly absorbed by the loss, would the stockholders who have paid $30 be called on in liquidation to divide the remaining $20 with those who have paid $50?

Illustrate the case by figures and an example. A., B., and C. agree to form a house, of which the capital shall be $300,000, each contributing a third, to be paid at the call of A. A. calls for $50,000 apiece, which is paid. The partners agree that any partner may pay the remaining $50,000, and participate in the profits accordingly. B. pays it. The firm first *gains* $100,000. Of course A. and C. receive $25,000 profits apiece, and B. receives $50,000. The firm next *loses* $100,000; so that but $100,000 of stock remains: and a liquidation is resolved on. By *our* division A. and C. would each take $25,000, and B. $50,000, and on a final settlement each would come out of the firm as he went in and relatively equal. But the other side, paying back to B. his whole $50,000, and dividing the remaining $50,000 between the three, gives to each $16,666. Now how does *this* leave the parties on the whole partnership? A. and C. put in $50,000 apiece. They each received, in profits, $25,000, and in liquidation $16,666. *They* have therefore each *lost* $8,334 on their original capital. B. put in $100,000, and received in profits $50,000. He now receives $50,000 to equalize him,

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For the dissatisfied stockholders.

and $16,666 in liquidation. He has therefore *gained* $16,666 on his original capital. In other words A. and C. have each lost 16 p. c. While B. has gained 16 p. c. This is unjust, and it arises from this unjust principle, that as to profits B. is a partner, while as to losses he is a creditor. And that he makes his stock an investment or a loan as suits his interest.

II. Admit that all these irregular and generally undesired payments, were "determined" by the board. Then the board has settled the "proportions" in which the stockholders should pay. They have settled that they would have in this bank $30 shares, $40 shares, and $50 shares. It is not uncommon in corporations to have old stock and new stock, and shares of different amounts. These shares, of course, were constantly sold, transferred, and treated as different sorts of shares. The whole course and dealing of the bank and of all its members with the public, for a term of thirty years—from the origin to the end of the charter—is not to be set aside as nothing. There were shares, then, of different kinds or values. The owners of the larger ones, of course, make larger ventures; those of the smaller ones, smaller; but all alike make ventures, and the returns, whatever they are, are to be proportioned to the value of the shares.

III. But if the bank, in its corporate character, could not make 'shares,' differing in amount, and each a complete share, yet the stockholders, by their long course of action, individually and through the board—by their long division of profits and losses, on this basis of unequal shares—having settled for themselves a division of profits and losses on this principle, why is it now, for the first time, to be de-

parted from? The whole argument of the other side will proceed upon the equity between partners. Is there not here, in our application of it, this very equity above every other?

IV. The speculation which caused the loss, was brought about by an excess of funds, the result of these unrequested, irregular, or illegal payments. The whole proper action of the board was on a capital of $30 a share. Having a power to call for full payment, they did not. Of course they could not depend on full payment, nor properly provide as on the basis of it. These stockholders pay in their money without request. The money is idle. Idle money, like 'idle hands,' is not well employed when employed in banks. The investment was one of madness, as it proved to be of ruin. But the very cause of it, was the act of the over-paying stockholders.

For the bank.

Messrs. *John Reed* and *W. M. Biddle*, for the bank, (which they represented as stockholders, merely,) submitted its case to the court under the opinion of counsel, already alluded to, which it offered as its justification, and which, by consent, was read as an argument. (A)

(A) OPINION.

Opinion of H. Binney.

I have considered this case, and am of opinion, that A. is entitled to receive ten dollars on his share before B. receives any thing, and A. is entitled to receive ten dollars more on his share, and B. ten dollars on his share, before C. receives anything, and then that they are all entitled to receive pro rata.

There is no way in which these payments by A. more than B., and by both of them more than by C., can be considered, that will not lead to the same result.

They are either a loan or advance to the bank, constituting a debt, or they are payments under their agreement of 21st of April, 1814, as under the determination of the directors, in pursuance of the Act regulating banks.

While I do not deem it material to this question to say with certainty, what

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For the stockholders in full.

Messrs. *Penrose* and *H. M. Watts* for the stockholders who had paid in full. A case identical in principle, and almost identical in instance, arose in 1843,

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they are, whether debts or contributions to capital, under the charter, I am of opinion that they are contributions to capital, under determinations of the board, because the board adopted and ratified such payments; and they are contributions which give to the shareholders who thus paid, the same equities against the bank and each other, for all they paid, as if all the stockholders had paid the same amount. All the stockholders took their certificates subject to all payments due and to grow due; and when the directors received payments from some more than from others, the stockholders so paying, were entitled in equity to the benefit of this clause in the certificates of all, and in equity the directors were bound to use it, if necessary, for their protection. The omission of the directors to call upon all to pay to the same extent, could not prejudice any of the stockholders who had paid. The duty of the other stockholders continued what it was originally. Their liability remained, and still remains, for the benefit of the other stockholders, as much as for creditors; and it is unnecessary to enforce it, only because equity will make the same distribution of the fund, as if the directors had expressly determined that all should pay, and had compelled payment from all. Whether debts or contributions to capital, under the subscription agreement, is however immaterial.

If debts to the extent of the excess, they of course must be paid before any portion of the capital is distributable among the stockholders. If they are contributions to capital, which one has made to a greater extent than others, all being bound to contribute the same amount, and every stockholder being entitled in equity to the benefit of this agreement as much as the corporation was, then it follows that in the division of the remaining capital, they who have advanced their full share, or more than others, are entitled to be paid first, so as to restore equality between them. This is the principle of co-partnership under like circumstances, and the stockholders of a bank are co-partners, and have, as against each other, the same equities in the distribution of the partnership funds after payment of debts. The consequence of the principle of pro rata distribution, claimed for those who have paid least, is this, that although all were and are bound to pay the same amount, yet that he who paid the whole of his share, must pay a greater portion of the debts of the bank than he who paid less; whereas, every share, by force of the agreement to pay it in full, is bound to pay the same portion of the debts; and if the directors do not compel a full payment by all, or attain the same end, by the distribution of what remains of the capital, they violate the equity of the stockholders among themselves. At the close of such a partnership concern, a court of equity would decree, if necessary, that the partners who had not paid their full shares, should pay up, or if it was unnecessary, because justice could be done between the parties in the distribution of the fund, they would decree so much in the first place to the partners who had paid most, as would produce equality among all, and then distribute among all pro rata. The same is the equity among shareholders in a bank, under such a subscription agreement.

HOR. BINNEY.

Philadelphia, Feb. 12th, 1846.

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in the Supreme Court of Louisiana.* The arguments there were, in a great degree, the same as those made here. The case was well argued on both sides. The Court gave a decree such as we ask. A motion was made for re-hearing, but after a powerful argument in support of it, a re-hearing was refused. The syllabus is as follows: "The act of incorporation of a banking company provided that its capital should be divided into shares of $100, of which $5 should be paid at the time of subscribing for the stock, and the residue in such instalments, and at such times, as might be required by the directors. Fifty dollars on each share were called in, and paid. A resolution, subsequently adopted by the directors, provided, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon, in proportion to the amount so paid in." Under this resolution a stockholder paid up the whole amount due on the stock held by him, and received dividends thereon, and loans (less, however, than the amount so advanced by him) upon the pledge of it. The bank having gone into liquidation, required the re-payment of the loan, and refused to call for further contributions from the other stockholders. An action was commenced by the stockholder who had paid in full, against the bank, to compel the calling in of the whole amount subscribed, or, in default thereof, or in the event of the inability of the stockholders to pay the balance due, to recover the amount paid by him beyond fifty dollars on each share, with interest on the over-payment, and to restrain the company from exacting repayment of the loan made to him, until the stock-

* Millandon v. The New Orleans and Carrolton Railroad Company, 3 Robinson's Louisiana, 488, 513.

For the stockholders in full.

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For the stockholders in full.

holders should be placed on an equality as to their payments. The bank, thereupon, sued on the notes given for the loan. On appeal from a judgment rendered in the two actions, which had been consolidated: *Held*, that no stockholder can be liable for more than one hundred dollars on each share held by him, and that each share must lose an equal amount on the final liquidation of the bank. That if the whole capital be sunk, those who have paid but fifty per cent., will be debtors for the balance; and those who have paid in full, cannot be called on for more. That if but half have been lost, the former are no further liable, but a balance will be due to the stockholder who has paid in full. That the payment of the whole amount of the shares under the resolution of the directors, did not change the relative position of the stockholders to each other as partners, except as to the dividends, the one having merely anticipated the payment of all he could ever be called on to pay, and the others remaining liable for the balance of their subscriptions. That the payment was under the tacit condition that, if the concern proved profitable, the party so paying, should receive dividends in proportion to the amount paid by him, and on the winding up of its business, after payment of the debts from the surplus profits, the whole amount so paid in; and, if not profitable, that he should lose only the same proportion, upon each share, as the other stockholders. That *quoad* the creditors of the bank, the excess above fifty per cent. so paid in, is capital, liable for its debts; but that, as among the stockholders, the party who made the advance is a creditor to the extent of the surplus, and entitled to interest thereon from the time when the

bank ceased its operations. That the stockholders are liable for the whole amount of their subscriptions; and that, if any further payment beyond fifty dollars on each, be necessary to the discharge of the debts of the company, it will be the duty of the directors to call on all the stockholders for an equal contribution; and that it would be unjust to use the amount paid by one stockholder, beyond the others, for that purpose. That the bank having gone into liquidation, a stockholder may maintain an action against it; and that the loan, being less than the amount advanced by the borrower beyond the other stockholders, may be retained by him, unless required for his proportionate contribution, towards the payment of the debts of the company."

Af'l Sessions, 1850.

Grier, J. The argument on behalf of the dissatisfied stockholders is very ingenious and plausible. Its defect lies in the assumption of facts, which do not exist in the case, viz., that the charter of the corporation which constitutes the law of the partnership, permits any other inequality of liability between the stockholders than that arising from the number of shares held by each one: or that a change of this principle is to be presumed, from the practice of the corporation in the division of its profits.

The Court's Opinion.

The charter of incorporation contains the fundamental rules which shall govern the corporation, not only as between it and the public, but also as between the stockholders and corporators themselves. As these have been established by law, on grounds of public policy, they cannot be changed but by the consent of the same power, which created the corporation. Much less can it be presumed from any equi-

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The Court's Opinion.

vocal acts, in the management of the corporation, or the mode of dividing its profits from time to time, that any change has been made in its constitution. The charter of incorporation being the supreme law of the corporation, no usage of its officers in the transaction of their business can change or annul it.

By the charter, the stock of this company was divided into 6000 shares. Each one of these shares is a unit indivisible, representing a certain and equal portion of the whole. The charter might be obtained under a subscription of less than 6000 shares, and individuals might hold unequal numbers of shares, but a share still remained the same. Whether paid in part or in whole by the law of the corporation, which is the contract of partnership, it represented fifty dollars. The man who subscribed a share and paid but twenty dollars stood debtor to capital stock thirty dollars. That debt was as much a part of the capital stock, as the money lent to strangers who had given their notes for the same. Each share of stock being a unit, there could be no inequality among the stockholders as to their liability for the debts of the corporation or their right to a dividend of profits, except in the inequality of the number of these shares held by each individual stockholder. And whether the stockholder stood debtor or creditor to the corporation for his stock subscribed, the directors had no power to change the fixed value of this unit, or to say that A.'s share of stock shall represent $20; B.'s 30; and C.'s 50.

They might well say, "You, A., have refused to pay up all the calls; we will not forfeit your stock as we might in strictness do for such neglect; but as you are unable to pay up, you may stand debtor to

the corporation for your $30. Our dividends do not much exceed 6 per cent. If we should lend you the money to pay up at bank interest, (which is compound interest,) you would get your dividend on your whole $50; but if you retain the interest, or 6 per cent. on your $30, perhaps you will have the best of the bargain. You can take your choice; pay your money and take dividend on $50, or retain $20 or $30, if you please, in your own hands, and credit us with dividends on that amount as set off to interest."

By this arrangement the stockholder who wants to lend money, by general agreement, pays in all his share, and gets about 6 per cent. for his dividend or the use of his money, and the stockholder who has no money to lend to others, retains his $20 or $30, and paying no interest; he of course having his dividend on that amount, by way of retainer. If the bank paid 8 or 10 per cent., the stockholder would immediately find it his interest to borrow money of the bank, and pay up his stock, and thus share in the higher dividend. In the case of this bank, the dividends do not appear to have held out much encouragement to do this. The defaulting stockholders have had undoubtedly the best of the bargain by this arrangement, and if they had not, they had no reason to complain of the consequences of their own deliberate choice.

Now, in order fairly to distribute the assets of this partnership as between A., B., and C., you must first ascertain the amount of capital stock. That by the law of corporation is, say $150, divided into three shares between A., B., and C., equal partners. Of this capital C., we suppose, owes nothing; having paid his $50; but B. owes to capital stock $20, and

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The Court's Opinion.

A. $30. Now, if A. and B. actually pay up their debts to the firm, there are $50 to be paid to each. But if they retain the one $20 and the other $30, it is as plain, that they are the first paid by retainer, and that C. has a right to be made equal to B. before he gets anything more, and both to be made equal to A., who has paid himself $30 by retainer, before A. can take anything more from the heap. After that, if there is profit, they all divide it equally, and if loss, they all divide it equally, according to the fundamental law of the corporation, which gave equal rights and equal liabilities to each holder of one share, and made that share a unit indivisible. It is true, like all indivisible chattels, it may admit of joint ownership; but such joint owners, however numerous, have but the powers, rights and liabilities of one person. Thus there may be multiples of the unit in the partnership, but there can be no fractions. On treating of the assets for the purpose of division, the calculation must be based on this unit and its multiples; the share or number of shares.

Now, taking A. and B. to represent the discontented stockholders in this case. What right have they to complain against the course pursued by the directors in settling this account? They have elected to stand debtors to stock, or in other words to borrow that much of the capital at common interest. If they had chosen, they might have paid in all and received probably a little more than 6 per cent., but they preferred *six sure*, to the chance of getting more. But this is not all. When the bank began to wind up *some years ago*, these stockholders retained their unpaid capital, thus having 6 per cent. on it, till *this time;* while the other stockholders receive their thirty

dollars without interest *now*, to make them equal with those who have retained. If principal and interest were brought into hotch-pot up to this time, and a dividend declared, as might well be done in justice and equity, under a correct construction of this charter, the unsatisfied stockholders would perhaps complain louder than they do now.

If there had been a large amount of profits for this final division, and those who by consent were allowed to retain the $20 on each share, and also to retain their interest in lieu of temporary dividends on that amount, should tender a payment of their $20 with interest up to this time, they would undoubtedly have a right to an equal share of the whole. The agreement among themselves to permit this detention or loan of part of the capital, could not affect their right guaranteed by their charter or articles of partnerships, to wit, that each share should be equal, and the only unit on which to base a proper dividend of gains or losses.

So on the contrary, if the whole capital had been sunk, equity would have compelled the delinquent stockholders to pay up their balance, or if there be a partial loss, still the final distribution of the lessened capital, would and ought to be on the same principle of equality, by calculating such debt to stock as part of the capital to be divided, and if not brought in, as actually retained and received by such stockholders.

A part of the stockholders cannot change the fundamental principles of their charter or articles of partnership, either by their default in paying, or election to retain, a portion of the capital. Nor can a chancellor annul the charter or change the stipu-

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lations of the parties, in search of a visionary equity.

The Court's Opinion.

Then as to another objection, that if the full paying stockholders had not paid in the money not required of them, the purchase of the United States Bank shares, by which the loss was caused, would not have occurred. It is to be remembered that the purchase was the act of the board, which is the bank. The stockholders, and all the stockholders, are represented by the board, and they neither are, nor can be heard to speak, or seen to act otherwise. How then is A. liable to loss rather than B. or C.? unless it be on the principle that if I lend a man money which he loses by unwise speculation, he may set up as a plea against its payment, that if I had not lent it to him, he would not have lost it, and that as my own act was the primary cause of loss, therefore I should bear it myself. The plea would be demurrable in law, and is without precedent in a Court of Chancery.

The case in Louisiana is in point, and we are happy to have our own views supported by so well considered a judgment of a Court necessarily familar with the equitable principles of partnership law.

This case, it is true, seems to have been overruled at a subsequent date; but as the learned judge who took chief part on the last decision, was the counsel who argued the first so ably, though unsuccessfully, it may be doubted whether the first case will not be considered, abroad, as the better authority.

Order for Decree.

Let the DECREE be that the directors distribute the sum now for distribution among the stockholders,

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Order for Decree.

paying to each respectively who may have paid in on the stock subscribed, or held by him more than other stockholders, the amount of such excess. And distribute the assets from time to time and as collected, among the stockholders, paying to each any sum he may have paid on each share of his stock more than any other stockholder on each share of his stock, and so *toties quoties* until the said stockholders are thus made equal in the amount paid in on their respective shares of stock, and pay from any balance or residue which may remain for distribution an equal dividend or proportion thereof on each share held by each stockholder respectively, so that each stockholder shall receive an equal share or dividend of such residue on each share of stock held by him.

DECREE ACCORDINGLY.(A)

[APRIL SESSIONS, 1848, NO. 1, EQUITY DOCKET.]

(A) This case was taken, by appeal to the Supreme Court of the United States, where the decree was affirmed by an equally divided Court. According to the usage in cases of such affirmance, no opinions were delivered.

A similar sort of affirmance is made in the great case of *Aspden's Estate*, reported in a subequent part of this volume. And a question naturally arises on both these cases, and may hereafter arise in others,—"*What is the nature and effect in law of a judgment affirmed from necessity in a Court of Error, on an equal division of the Court?*" The point was considered by the late Horace Binney Wallace, Esquire, in a review not generally accessible to the profession, of the unreported case of *M'Dermond* v. *Kennedy*, in the Supreme Court of Pennsylvania. The late Chief Justice GIBSON had spoken of that case as furnishing *an authority in point*, for a particular position: a statement which the Editors of the Pennsylvania Law Journal for December, 1846, considered, was not warranted by the facts of the case. The case, it appeared, had come before the Supreme Court of Pennsylvania on an appeal, involving, in an abstract form, a question relating to the power of municipal corporations to tax in a particular instance. The Court below denied the right. The case was argued in the Supreme Court, and there fully considered by the four judges present: but no opinion was delivered, and the judgment below was simply affirmed. There was no report or evidence of any other particulars in the case. The observations of Mr. H. B. Wallace are as follows:—"If the case, in fact, was deliberately considered by the judges in consultation, and in consequence of this consideration, the judgment of the Court of Common Pleas was affirmed, it is a matter of inferior moment, and not in the

H. B. Wallace, on judgments from necessity.

Ap'l Sessions, 1850.

H. B. Wallace, on judgments from necessity.

least degree affecting the authority of the decision by the Supreme Court, that no written opinion was delivered, or that by misapprehension or otherwise, the case was not assigned after consultation to any particular judge to prepare an opinion upon the subject. The absence of a written 'opinion' may render it difficult, or perhaps wholly impossible, to determine what principle the judgment of the Supreme Court did establish, but the judgment is an *authority* for some principle, whatever it may be.

There is some doubt as to a part of the history of this case. We do not know all that was done in the Supreme Court. But materials enough exist to enable us to determine, beyond doubt, that there was here a judgment of the Supreme Court on a point of law.

We know that a judgment of the Common Pleas denying the right of the borough to assess a certain tax was brought into the Supreme Court, by writ of error, in order to try the right. We know that there was an argument by counsel before the Court, and a consultation upon the case by the Court. And we know that, during the term, the judgment of the Common Pleas was affirmed. Four judges, only, sat; and what were their individual opinions, we do not know. There could not have been a majority in favour of the right, or else the judgment of the Common Pleas would not have been affirmed. Either the judges were unanimous, or a majority of them were against the right; or they were equally divided in opinion, and the judgment of the Common Pleas was affirmed from necessity. How this was, no evidence exists to show. Take it at the worst that is possible, and what is the nature and effect in law of a judgment affirmed from necessity in a Court of error, on an equal division of the Court? The history of the late case of *The Queen* v. *Millis*, will afford an illustration on this subject.

This case, reported in 10th Clark & Finnelly's Appeal Cases, 534, involved the question whether a contract of marriage *per verba de præsenti*, but not made in the presence of a minister, in Episcopal orders, constituted a full and complete marriage at common law. On an indictment for bigamy, which depended on this question, the Court of Queen's Bench in Ireland, four judges sitting, were equally divided, but afterwards, and for the purpose of obtaining the judgment of the House of Lords, one judge, who had been in favour of the validity of the marriage, in form withdrew his judgment, and thereupon a judgment of acquittal was entered, and the case was brought by *certiorari* to the House of Lords. In the House of Lords, Lords Abinger and Cottenham and the Lord Chancellor were of opinion that it was not a perfect marriage, and were for affirming the judgment; Lord Brougham, Denman, and Campbell were of the opposite opinion. The entry on the journals of the Lords is, "It was ordered and adjudged by the Lords, that the judgment given in the said Court of Queen's Bench be, and the same is hereby affirmed; and that the record be remitted," &c. And the fuller entry on the minutes states that Lords Cottenham and Campbell having been appointed to tell the number of votes, it appeared, on report thereof, that the votes were equal, that is, two for reversing, and two for affirming, "whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, it was determined in the negative. Thereupon the judgment of the Court below was affirmed, and the record remitted."

While this case was pending in the Lords, the case of *Catherwood* v. *Caslon*, involving the same general question, came on in the English Court of Exchequer,* and after argument, judgment was suspended until the decision of that case. "The case of *Regina* v. *Millis*," says the reporter of the case in the Exchequer, "having been determined, and the invalidity of a marriage at the

* 13 Meeson & Welsby, 261.

common law, contracted *per verba de præsenti*, but not in the presence of a priest in holy orders, having been thereby established, the present case came on again for argument." The counsel sustaining the side of the marriage admitted that "according to the decision of the House of Lords, it must be taken that no valid marriage had been contracted;" and Parke, B., in pronouncing the judgment of the Court said, "The parties in this case entered into a contract of marriage *per verba de præsenti*, in the presence of witnesses, but not proved to have been made in the presence of a minister in Episcopal orders. Since the original argument, it has been decided in the House of Lords, in the case of the *Queen* v. *Millis*, that unless in the presence of such a minister, such a contract does not constitute a valid marriage at common law in this country: and *by the authority of that case we are bound.*"

Undoubtedly, the affirmance of the judgment in the *Queen* v. *Millis*, was against what had been the general impression of the profession after the case of *Dalrymple* v. *Dalrymple*, yet no one in the Exchequer suggested that the affirmance in the House of Lords by an equally divided Court had not settled the law by conclusive authority. An equal division of a Court of error, on a question of reversing a judgment, is like a tie vote in a legislative assembly on a question of enacting or repealing a law. The binding nature of the decision is the same, as where the action of the body is unanimous. The influence of an opinion, on the minds of professional persons, will depend on the character of the judge who delivers it, and on the number of judges who unite in it: but the authority of a judgment of a supreme tribunal, as establishing a principle and settling the law, is the same whether the Court be full and unanimous, or partial and divided. A judgment affirmed by a divided Court binds inferior courts, and of course is a precedent in the Court in which it was entered. And not only is the judgment of a Court, in itself, an authority; but it is the only thing that is an authority.

It follows that Chief Justice Gibson was strictly accurate in saying of *M'Dermond* v. *Kennedy*, that 'had the case been reported, it would have furnished AN AUTHORITY IN POINT.'"

VANTINE V. THE LAKE.

[COLLISION: WHARF—DAMAGES: COSTS OF REPAIR.]

1. A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other, for all injuries resulting from her proximity, which human skill or precaution could have guarded against.
2. The schooner L., on entering a dock at high-tide, was directed by her consignees to be moored to an adjoining wharf of which they were lessees, outside of The M. J., a smaller vessel. There was not in the dock during part of the ebb, enough water for The L., though there was sufficient for The M. J.; of which fact the consignees, but not the master of The L., were aware. No objection was made at the time from The M. J., nor any caution given. On the tide receding, The L., on this account, and from the bottom of the dock being banked up in the middle from accidental causes, (with which the consignees were also acquainted,) careened over on The M. J., crushing her timbers, and causing her to fill and sink. As soon as the danger was perceived, a measure of prevention was suggested by The M. J., but rejected as useless. *Held*, that The L. was bound to know the depth of water in the dock, or at any rate was responsible for the directions of the consignees, who had full knowledge; and that she had not taken proper precaution before or after the injury. The L. condemned in damages.
3. Besides the costs of repairs in this case, charges for wharfage while repairing; for the time of one of the owners, and of the crew in raising and clearing out the injured vessel; and for the loss of profits to the vessel while sunk, and during the time she was being repaired, allowed by the Court in the assessment of damages.

Oc'r Sessions, 1850.

Statement.

THE libellants were owners of The Mary Jane, a small oyster boat of twenty-seven tons, which was fastened to a wharf on the Delaware. While she was discharging her cargo, the respondents' vessel, The Lake, a much larger vessel (one hundred and twenty-five tons,) was hauled into the same dock, and the dock being full, was fastened outside her, to the same wharf. The Lake came into the dock with the high tide, when the water was amply sufficient, but on the ebb, there being not enough water to keep her afloat, she settled in the mud, and careened over. The deficiency of water was so great that she

was aground for about five hours in each tide; and as the tide first receded, The Lake being the larger vessel, and fastened to the same wharf with The Mary Jane, held her suspended between herself and the wharf, till the timbers of The Mary Jane were crushed in, when she filled and sank to the bottom; from which she was raised at considerable expense and loss. The libel was for damages accordingly.

It appeared from the respondents' answer, that The Lake took her position in her berth by the orders of her consignees, who were the lessees of the wharf, with the precautions usual in such cases; that the libellants took no exception to the manner of fastening The Lake, and gave them no caution or warning, whereby her master could know that she would be aground at all; that her master was altogether ignorant of the state of the dock, and presumed from the orders he received from the consignees, and from the acquiescence of the master and crew of The Mary Jane, that the dock was sufficiently deep at all times of the tide to keep The Lake from listing.

As soon as the crew of The Mary Jane perceived the injury that was about to take place, they informed the master of The Lake, and suggested as the only means of saving The Mary Jane, "to take a purchase from the mast-head of The Lake to the wharf on the south, so that she might be eased off by the flare of her side." This the captain of The Lake refused to do, saying, "that it would be of no use." Other means were employed, which proved inefficient.

The proximate cause of The Lake's careening was, the banking up of the bottom of the dock at its mid-

Oc'r Sessions, 1850.

dle, in consequence of two heavy vessels having formerly rested there; and the consignees of The Lake were aware of this fact, and knew that the water was insufficient for a vessel of her draught.

For the Libellants.

Mr. *Emlen* for the libellants. There has been no act of God in this case, and the damage has arisen altogether from an act of The Lake, which occurred from want of due vigilance in her ordinary and proper business. It was her duty to know what water she drew, and what water she would have in the dock which she was entering. An inquiry from any body about, or a thrust with a pole, would have told her that the water was shallow. *Her consignees owned the wharf, and of course did know.* Their knowledge is her knowledge. It was no part of The Mary Jane's duty, to keep all or any other vessels apprized of the depth of the city docks. She was minding her own business, and had a right to suppose that the other vessel was minding her's, and a right to suppose nothing about it. Even if The Mary Jane had been improperly moored, still being moored, it was The Lake's duty to keep clear of her, or else so to moor herself as to avoid all injury. This is a well settled rule of the admiralty, with regard to "vessels at anchor."* The English courts go further on this subject than the present case requires. They did so in *The Volcano*.† In that case The Helena, a brig of one hundred and sixteen tons, came to anchor in Mahomet's Bay, on the coast of Spain. The steamer Volcano ran for shelter from a gale into the same bay, where she took up an anchorage, two cables' length from The Helena, on her starboard bow, with her small bower

* The Gerolamo, &c., 3 Haggard's Admiralty, 173; The Batavier, 10 Jurist, 19.

† Quoted, Pritchard's Admiralty Digest, 129, *note*, as being in 3 Notes of Cases, 210.

anchor (weighing but sixteen cwt.) and a chain cable only an inch and a quarter thick. About midnight a hurricane arose, and caused The Volcano to drift; the anchor broke, and though another was dropped, The Volcano, by a sudden sheer, drifted athwart hawse of the brig; and having again come in collision with her, the brig ultimately went down. It was held, in a cause of damage, in respect of such collision, instituted by the owner of the brig, that there was a want of proper precaution in the position which The Volcano originally took up, and in not letting out more cable and a second anchor.

Oc'r Sessions, 1850.

For the Libellants.

Messrs. *Barnes* and *Donnegan* for the respondents. Admitting that it was The Lake's duty to know the depth of the water, it is conceded that in point of fact she did not know it: and the question is, can The Mary Jane, having been, herself, to all appearance grossly negligent, recover damages for this want of knowledge? The Mary Jane had been in dock three days before The Lake came there. The tide had been in and out several times during this term. She knew exactly its depth. She sees a large vessel moor beside her, with ropes across; and can readily anticipate the result when the tide goes out. In this state of things and with this certainty of damage, no man aboard the Mary Jane once unseals his lips to suggest a doubt, or to stop The Lake. Damage occurs through a pure accident, which one word, or half one word, from The Mary Jane, would have prevented. What right has *she* to sue for damages?

For the Defendants.

GRIER, J. It cannot be pretended that the injury from this collision was caused by any fault of the

THE COURT'S OPINION.

Oct'r Sessions, 1850.

The Court's Opinion.

libellants' vessel, or that her master or crew were in any way to blame for the result, unless we admit what the answer assumes, that they were bound to know the depth of water necessary to float The Lake, and to give her notice to keep farther off, because the dock was not deep enough to float her at low tide. But I think this assumption is entirely without foundation. The Mary Jane was fast to the wharf, and her master and crew attending to their own business in unloading her cargo. They were bound to know whether the depth of water was sufficient for their own vessel; and the master of The Lake was bound to know how much water his own vessel drew, and whether the dock would float her. Moreover, she drew into the wharf by the orders of the consignees, who were lessees of the wharf, and *who did know* that the water was insufficient for the draught of The Lake, and *who did know* that the bottom of the dock had been banked up in the middle, which is alleged to be the proximate cause of The Lake's careening over on The Mary Jane. The master of The Lake, then, was bound to know whether the dock would float his vessel, and not only so, the consignee, under whose order he acted, (and who *pro hac vice* acted as his pilot,) did in fact know the state of the bottom, and the depth of the water in the dock, for the fact is brought to light by the very person who gave the direction.

Now the answer does not allege that there was any *vis major*, or inevitable accident which caused the injury, nor indeed was there any. But it is imputed as a culpable negligence in the libellants, that they did not give notice to the respondents, of a fact of which the libellants were ignorant, and not bound to

Oc'r Sessions, 1850.

The Court's Opinion.

know, and which those who ordered the respondents' vessel to take that position actually *did know*. Without insisting on the fact that the master of The Lake refused to use the only probable means of saving The Mary Jane, when informed of her situation, it seems to me, that he was to blame in not taking proper precautions both before and after he was aware of the injury likely to accrue to the libellants' vessel from the position in which he moored The Lake; and he has failed to make out a case of unavoidable accident or *vis major*, which no human skill or precaution could guard against.

The case of The Volcano cited at the bar resembles the present in some respects. The precautions taken by The Volcano were amply sufficient, but for the hurricane which her commander had not foreseen, or probably could not foresee; but not having taken proper precautions against any hurricane which might possibly arise, he was held liable. Here the state of facts which caused the respondents' to come into collision with the libellants' vessel, was actually known to the person who *pro hac vice* was the commander, or under whose directions The Lake was moored; but no precaution was taken to avoid the collision which afterwards took place. Moreover, there was a refusal by the master of The Lake to use the only probable means of avoiding the injury, while yet in his power to have done so.

The libellants are entitled to a decree for the amount of damages incurred, to be assessed by the clerk, to whom the case is referred for that purpose.

Decree for Libellants with costs.

The clerk, having afterwards reported on the amount of damages sustained, exceptions to his Re-

Oc'r Sessions, 1850.

Decree for Libellants with costs.

port were filed, on the ground that he had allowed charges for wharfage for The Mary Jane while being repaired; for the time of one of her owners, and of her crew while raising and clearing her out; and for the loss of profits to the vessel while sunk, and during her repairs.

But the Court, after argument, confirmed his Report.

[OCTOBER SESSIONS, 1850, NO. 1, COMMON LAW DOCKET.]

ROBSON V. THE HUNTRESS.

[SALVAGE: NATIONAL VESSEL: PRACTICE.]

The officers and crew of a Foreign Vessel of War are entitled to salvage in causes, civil and maritime, as other vessels are.

A consul of a Foreign Power, though not entitled to represent his sovereign in a country where the sovereign has an ambassador, is entitled to intervene for all *subjects* of that Power interested: and though he should not set forth the particulars of his claim, still it will do if they can be fully gathered from the allegations of the libel and the case it sets forth.

Application of the principle of salvage to particular facts, and amount of salvage fixed in them.

Ap'l Sessions, 1851.

Statement.

THE Huntress, an American brig, bound on a trading voyage to Sierra Leone, and other places on the west coast of Africa, was fallen in with, off Cape Lopez, (lat. 2° 30′ N., lon. 9° 45′ E.,) by the Jackall, a steam tender to H. B. M.'s ship Gladiator. The brig had her flag hoisted Union down, which is the ordinary signal of distress. On boarding her, it was found that her captain had died some time before, and that the first mate, having been taken with the coast fever, was lying senseless, apparently near his end. The crew was composed of five coloured men and one white man, the second mate. The second mate and some of the crew understood how to sail the vessel practically, i. e. to put her about, &c., and had been on the coast of Africa before; but none of them understood theoretical navigation, could take an observation, or make a reckoning; nor could the second mate either read or write. They had been sailing for four days at random; sometimes approaching land, and then bearing away to avoid running ashore, or to escape from piratical looking boats: and seeing, as they thought, a French brig at anchor, they were

Ap'l Sessions, 1851.

Statement.

about to run into what they supposed the river Gaboon, but which was in fact a small inlet two hundred miles further north.

In this condition, they put themselves into the charge of the Jackall: and Lieut. Bedingfield, its commander, having put the master's assistant of that vessel, on board, this person after twenty-four hours' sailing brought the Huntress to the island of Fernando Po, in a cove of which the Gladiator was lying at anchor. Here the British commander, Capt. Adams and the other officers of the Gladiator did what they thought the case required. Their surgeon came on board to the aid of the mate, but he was already dead. The vessel was supplied with water, medicines, and stores. An anchor was furnished her to replace one she had lost. The property on board was collected, carefully inventoried, and sealed up. Disinfectants were employed to remove or diminish the causes of disease on board. And with the assent of the second mate, and in accordance with his opinion as to what was best for the owner's interest, it was determined to send the Huntress home to the United States. Lieut. Robson, of the royal navy, was placed on board to navigate her, and two men to complete her effective complement; three of her surviving company being at the time off duty in consequence of sickness. She was then despatched to this place, where her owners reside.

The coast fever, of which the mate and probably the captain also had died, is known to be malignant: and, notwithstanding precautions which had been taken to disinfect the Huntress, and though Lieut. Robson kept clear of the cabin as much as possible; sleeping on deck, and going below only to make out

his reckonings, he was attacked by this disease a few days after leaving the coast, and struggled with difficulty, and through much danger against its effects, until he reached this country. On his arrival here, sixty-nine days after leaving Fernando Po, he was so ill that his physicians considered him "unfit to be moved;" and the libel alleged that his health had been so much shattered that he would be permanently prevented from resuming a post on the African coast, or from again visiting it.

In the course of his voyage to the United States, Lieut. Robson encountered some insubordination from his only officer, the original second mate of the Huntress, whom he suspended for some time from duty, and afterwards brought into obedience. Having brought the vessel safely to this port, Lieut. Robson, for himself, and the British consul at Philadelphia "for all others interested," filed their libel against her, in a cause of salvage, civil and maritime." The libel set out the case particularly in all respects, except stating specifically for whom the consul appeared. The original voyage, of course, was broken up.

Argument for the Owners.

It was contended by Messrs. *H. J. Williams*, *G. M. Wharton*, and *J. W. Biddle*, in the District Court, whence the case came here by appeal:

I. That the libel, so far as any body else than Lieut. Robson was concerned, was wholly deficient in certainty; it not showing with any precision, for whom the British consul was acting, nor for what service he claimed salvage.

II. That however a consul might have a right to represent subjects, he had no right to represent his sovereign in a country where that sovereign had, as

Ap'l Sessions, 1851.

Argument for the Owners.

here, an ambassador resident; that salvage could not be claimed by a vessel of war of a foreign country; or at any rate that unless the ambassador intervened in behalf of his sovereign or of the British admiralty as owner, the third part usually decreed to *owners* for the risk incurred by their property, would be considered as waved.

III. That there was, in this case, no salvage service, in the proper sense of the phrase: that there was no voluntary risk, either of life, health or property, on the part of the British officers or men, in the services rendered to the Huntress: that the vessel was not saved from destruction, by anything done for her, because she was not at the time in peril of destruction: that those on board of her, could easily have preserved her from that: that even if she were so saved, it was by bringing her into Fernando Po, where she was certainly safe: that the subsequent conducting of her to Philadelphia, could not constitute salvage, and however well meant, was really injurious to her owners, by breaking up the voyage. The sickness of Lieut. Robson on the homeward voyage, was but an incident, not caused by the service, nor really growing out of it, and was not a risk attendant upon it, nor one which he voluntarily incurred; nor was it a circumstance that enhanced the merit of his labour, any more than his accidental falling from the rigging and breaking of a limb, (had this occurred,) would have done so. He could be fully compensated by paying him for his lost time at the usual rate paid to navigators: that the service rendered by Lieut. Bedingfield and the master's assistant amounted to nothing more than towage: that there was no feature in the case which called for the application of

A P'L SESSIONS, 1851.

Argument for the Owners.

the rule of per centage upon the value of vessel and cargo, to the measure of compensation to the libellants: that there could be no *constructive* salvage service; it must be real, actual and *personal;* and this disposed of the pretensions of all who did not actually labour for her rescue, if in danger. As connected with this subject,

IV. That on the west coast of Africa, between Monrovia and the part of the coast where the brig fell in with the Jackall, are a number of trading ports, at many of which—as might be naturally inferred—a navigator might have been obtained from some of the vessels trading there, viz., Cape Mesurado, Grand Bassa, Cape Palmas, Jack Lahua, Dix Cove, Elmina, Cape Coast Castle, Anambooa, Accra, Lagos River, Loo Boo, Calabar Bonny, and others: that at Sierra Leone, which is a large settlement, with considerable trade, a competent navigator might have been obtained on shore; and that at the island of St. Thomas, a Portuguese settlement, where vessels of the American squadron are in the habit of calling, there are several vessels owned by residents of the place trading with different European ports, whose officers and crew make their homes at the island, some one of whom could very probably have been induced to take charge of the brig, and thus any necessity of sending the libellant and the vessel home, and breaking up the voyage, might have been avoided: that certainly a navigator might have been found there to bring her home: and that Lieut. Robson having chosen to act in the capacity of an ordinary navigator, was to be paid only the services of such a person.

On these arguments, and on the general question of amount of salvage, the opinion of the District

Ap'l Sessions, 1851.

Opinion of the District Court, against the Owners.

Court was given substantially as follows, by KANE, J. "One of the parties libellant (Lieutenant Robson) is himself a direct party in interest, and so represents himself; and the vessel, once brought into the custody of the admiralty, upon his libel alone, would be retained here till all other interests had an opportunity of presenting themselves for hearing against her. Were he the only party before me, and it came to my knowledge, either from the pleadings or the proofs, that other meritorious salvors were by force of circumstances, prevented for the time from asserting their right formally against this vessel, I should have no hesitation in impounding in the registry such sum as they appeared entitled to, to await their legal demands.

"But this is not exactly such a case. The British consul makes himself a party 'for all others interested;' and though it would certainly have been more regular to set forth their names, or otherwise designate them in the caption of the libel, yet the defect must be regarded as merely formal, since it is supplied adequately by the rest of the instrument, which sets forth the history of the case in such a way, that I can infer whom he represents.

"As to the other suggestions, I must frankly say, that had the conduct of Captain Adams been in accordance with them, it would have wanted much of the merit which I now ascribe to it. Had he sent the brig on a vague and round-about hunt for a consignee, expensive, of course, and probably fruitless; or had he trusted her with her cargo to some navigator enlisted by chance on a coast rife with piracy; or had he, after securing her safety, left her at Fernando Po, with her crew of half-breeds and negroes,

Ap'l Sessions, 1851.

Decree of the District Court, against the Owners.

to eat up or spoil upon the property of her owner; or had he even followed an example found in our diplomatic records, and detained her while he could arrange by contract the just value of the services he had rendered, and was about to render, I apprehend that a court of admiralty would have been very reluctant indeed to table a large decree in his favour. It is to his praise, that what he did was the reverse of all this: it was well judged, liberal, protective of the interests which misfortune had cast upon him, and justly confiding withal towards the country whose citizens he had relieved or rescued.

"This conducts me to the remaining consideration which should have influence on my decree: What obligations were there, resting upon these salvors, to do as they have done? Absolutely none, but those of human fellowship. They were strangers, subjects of a foreign power, at a great distance from home, armed and cruising for a special object, requiring their full complement of men to man prizes, and meet the ordinary casualties of a sickly climate. It illustrates the advancing civilization of the age, that alien flags are thus summoned on distant seas to perform offices of brotherhood, and the armament of war is found ministering to the charities of men. The considerations are higher and more noble than any of policy, that prompt us to foster the spirit which these salvors manifested by their conduct.

"Still, the task of adapting to it a pecuniary compensation is not easy. It refers itself largely to the judicial discretion. It is impossible to find in an adjudged case circumstances altogether parallel to those of the case before us. The *Charlotte Wylie*,* was that of an English vessel, relieved and sent

* 2 Wm. Robinson, 195.

Ap'l Sessions, 1851.

home by a cruiser of her own nation: her condition, too, was much less perilous; for she had an officer of her own on board capable of navigating her, and those who brought her to England did not suffer in health. *The Amistad** approaches nearer to our case; but that had some of the features of a military service: there the decree was for one third. Referring myself particularly to the opinion of the Supreme Court in *The Blaireau*,† and to the remarks of Mr. Justice Washington, in deciding *The Cora*,‡ and those of Mr. Justice Story in *Tyson* v. *Prior*,§ I think I shall not depart widely from the principles which have governed our courts in cases of civil salvage, if I allow to the salvors one-fourth of the value of the property saved, after deducting the charges against it."

*15 Peters, 518.

†2 Cranch, 240.

‡2 Peters's Admiralty Decisions, 375.

§1 Gallison, 133.

Decree by District Court of one-fourth.

The value of The Huntress was $3,600, and that of her cargo $11,000, in all $14,600. From this His Honor deducted charges for anchor, water, stores, &c., put on board at Fernando Po, $98.34; Lieut. Robson's charges for board, physician's bills and passage home, $395, some other small charges of the hands, in all $576.32: and of the balance $14,023.68, awarded *one-fourth*, $3,505.92, as salvage, in the manner following.

1. To pay the libellants, proctors and advocates, a reasonable sum.

2. Of the residue, one-third Lieut. Robson.

3. The remaining two-thirds to Captain Adams and the officers and crew of the Gladiator and Jackall, including Lieut. Robson; in such manner as would be awarded by the English admiralty.

THE CASE coming on this decree of the District

Court, by appeal, into this Court, the same general arguments used there were repeated and enlarged upon here. And it was further urged, that salvage for services rendered by national vessels, or vessels of war, was not known to the law, which allowed it only in favour of merchant seamen; and that even if the District Court were right in its general principles, and in applying the doctrine of salvage to the case at all, it had misapplied them in awarding for salvage so much as *one-fourth* of the value of the vessel.

Ap'l Sessions, 1851.

Decree by District Court of one-fourth.

GRIER, J. It is no objection to a claim for salvage that the service has been rendered by the officers and crew of a national vessel; or that such vessel is in the service of the sovereign of a foreign nation.

Opinion of the Circuit Court.

The right of a consul to intervene on behalf of citizens of his own country who are absent but interested, seems too well established in practice to be doubted. He cannot intervene for his sovereign when such sovereign has a minister or ambassador resident in the country. Regularly he should state for whom he intervenes, more fully than is set forth in this bill. But this defect may be remedied as suggested, and carried out by the final decree.

I concur with the District Court, that the services rendered by Captain Adams and Lieutenant Robson are highly meritorious, and partake of the nature of salvage service, and should therefore be liberally rewarded.

On principles both of policy and justice, salvage services should be estimated on a more liberal and enlarged scale than a mere compensation for work and labour. It is a reward for rescuing a ship from

Ap'l Sessions, 1851.

Opinion of the Circuit Court.

some impending danger and distress. Its ingredients are, 1st, Enterprise in the sailors in rendering assistance in tempestuous weather, and at risk of life. Secondly, The degree of danger and distress from which the property is rescued. Thirdly, The degree of labour and skill displayed by the sailors, and the time they are occupied. And fourthly, the value of the property saved. When all these occur, a large reward ought to be given; but where none such, or scarcely any take place, the compensation can hardly be denominated a salvage reward; it is little more than a mere remuneration *pro opere et labore.**

* The Clifton, 3 Haggard, 120.

1. The Huntress, at the time these services were rendered, was not in immediate or imminent peril; though from the sickness of her commander (the first mate,) and the nautical ignorance of the second mate, on whom the command devolved, she had been brought into a situation where it was highly probable she might incur great danger. The danger from pirates is perhaps more imaginary than real; it may have been *possible*, though not probable, on a coast frequented daily by British war steamers. The men had sufficient skill to navigate the vessel clear of any visible dangers, such as running her on shore in the day time, though without knowledge sufficient to guide her through the ocean, or to conduct her to her place of destination.

2. The assistance rendered to her by Lieutenant Bedingfield required neither enterprise nor risk of life or property. The crew of the Jackall rendered no service or labour whatever, nor were required to render any. The Jackall, a public vessel, was not diverted from the performance of her regular duty

on the coast. The service rendered by Mr. Barret, though requiring the nautical skill of a pilot, subjected him to no unusual risk, and required no uncommon skill. The conduct of Lieutenant Bedingfield, Captain Adams and Mr. Barret in the whole transaction, was highly honourable and morally meritorious, though requiring no great enterprise or physical exertion, or subjecting them to unusual peril. But the services of Lieutenant Robson were undoubtedly characterized by all these qualities. I shall not stop to inquire whether the sickness, which attacked him after he went on board The Huntress, can be attributed to any peculiar infection to which he was subjected on board that vessel. It is enough that he suffered after he came on board; that he was cut off from medical assistance, and in great danger of life; and we do not know that any other cause produced the evil. Whether he can be said to have voluntarily encountered a danger which neither he nor Captain Adams anticipated when this service was undertaken; or whether if such a consequence had been anticipated, the danger would not have probably been encountered, are speculations which cannot affect the case.

Lieutenant Robson is, therefore, the only person who has incurred any hazard or unusual labour, or expended time or money in rendering salvage services to The Huntress. The other officers named rendered services undoubtedly meritorious and useful, and deserving a liberal reward from the owners of The Huntress; but the owners of the salving vessel (the British Admiralty) and the crew rendered no service whatever that can be appreciated, and the case is not one of military salvage. The loss of the

Ap'l Sessions, 1851.

Opinion of the Circuit Court.

service of Lieutenant Robson, if of any importance to the admiralty, will be compensated by the deduction from his pay while out of actual service.

The practice of the last century in salvage cases is thus described by Sir Edward Simpson:—"The maritime laws of England fix no certain proportion in cases of salvage, but are governed by circumstances of danger, hazard, trouble and expense of saving. An *eighth* or *tenth*, except in cases of *extreme* hazard, is as much as is usually allowed. In some cases of *extreme* hazard, one-third, one-fourth, one-sixth or one-ninth, or a sum of money only, on account of salvage is given." In this country in cases of derelict, or saving from imminent and impending destruction, with great hazard and labour, it is usual to allow a half, a third, or a fourth. The fact that one of a crew of eight persons coming from the coast of Africa, was taken with the fever, is no evidence that any uncommon or extreme hazard has been encountered.

As there are but four persons who have actually rendered any service at all to The Huntress; as three of these encountered no hazard, and performed no labour, except twenty-four hours' pilotage by one of them; as the vessel, though astray and *lost* in one sense of the word, was not in any immediate or imminent peril, I do not think it a case which calls for one fourth of the vessel and cargo, after paying all expenses, in order to give a liberal remuneration for the labour and peril encountered in rendering this service.

Decree of District Court Reformed.

The decree is therefore modified as follows:—Out of the gross value of The Huntress and cargo, $14,600—

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Decree of District Court Reformed.

1. Pay expenses, &c., $576.32, as taxed by District Court.

2. Taxable costs and proctor of libellants' fees reasonably due in District Court, and taxable costs in this court.

3. To Lieutenant Robson,	$1400
To Captain Adams, of H. B. M's Ship Gladiator,	300
To Lieutenant Bedingfield, of The Jackall,	200
To Master's Assistant of The Jackall (Barrett,)	100

[APRIL SESSIONS, 1851, NO. 3, COMMON LAW DOCKET.]

UNITED STATES V. WEISE.

[TAXATION.]

[INTENTION AND POWER OF STATE TO TAX PROPERTY OF THE UNITED STATES.]

An act of a State legislature laying a tax on *all* real estate, *to wit*, on *various sorts of real estate specified by the act, and as such shown to be private property*, does not include property of any sort of the United States within its territory. Any general words are controlled by the specifications.

Whether or not a State has power to tax such property, and granting that it has, it cannot enforce the tax by levy and seizure.

Ap'l Sessions, 1851.

Statement.

In 1844, the legislature of Pennsylvania passed a tax law, by which they enacted that "*all real estate*, to *wit:* houses, lands, lots of ground and ground-rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, tan-yards, fisheries and ferries, wharves, and all other real estate not exempt by law from taxation," should be valued and assessed and subject to taxation for "*State and County*" *purposes*.

This act did not differ essentially in its enumeration of subjects of taxation from a prior one of 1834, under which taxes had been laid in Pennsylvania, though somewhat more particular in specifying them, and more searching in a process by levy and sale prescribed for obtaining payment.

Under this act of 1844, Weise, a collector of state and county taxes for Cumberland county, Pennsylvania, presented to the officers of the United States Garrison or Barracks at Carlisle in that county a bill for '*County and State taxes*' assessed for 1851 against the said "*United States Garrison;*" and payment being refused, proceeded in the form prescribed by

Ap'l Sessions, 1851.

Statement.

the act for ordinary cases, *to levy and seize upon certain property of the government and of the officers then occupying the garrison, intending to sell it to pay the tax.* An application by consent for a perpetual injunction, restraining him "as well from further proceeding in the levy already made, as from making any levy upon any other property of the United States or any officer or other individual in their service, from the payment of said taxes,"—having been made against him, the following questions were propounded to the Court by Mr. *Ashmead*, D. A. U. S., for the United States, and Mr. *Penrose*, for the collector.

I. Has a State power to tax the forts, navy-yards, custom-house, mint, garrisons, or other property of the United States used for the necessary purposes and operations of government?

II. Granting the State has such power or right, can it be enforced by levying and seizing the personal property of the United States and their officers and servants?

III. Has the State of Pennsylvania authorized the assessment of taxes on such property?

The Court's Opinion.

July 25th.

1st Point.

Grier, J.—The first question has been the subject of much discussion of late. It has been twice argued before the Supreme Court of the United States, but remains undecided: and as the present case can be decided without expressing my opinion upon this point, I prefer to remain uncommitted by any public expression of it, till it shall again be brought before the Supreme Court and fully argued there.

It has been more than once decided, "that State governments have no right to tax any of the consti-

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The Court's Opinion.

tutional means employed by the government of the Union to execute its constitutional powers."* That the mint, navy-yards, arsenals, &c. are "means or instruments" of this description, cannot be denied. It follows necessarily that a tax imposed upon these instruments or means, *as such*, by a State would be illegal. But it may be contended that although a State cannot tax a "mint or navy-yard" of the United States, *eo nomine*, yet that where the jurisdiction over the *land* on which they are erected has not been ceded, it still remains subject to all the duties and burdens to which it is liable in the hands of individuals or private corporations. However this may be, it does not follow as a necessary consequence that where a State has legally imposed a tax on lands used for forts, &c., that the payment of such tax may be enforced by distress or seizure of the personal property of the United States government or its officers.

*M'Cullough v. Maryland, 4 Wheaton, 316; Weston v. The City Council of Charleston, 2 Peters, 449.

2d Point.

2nd. "The government of the Union is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be executed directly on them and for their benefit." "And this government, though limited in its powers, is supreme within its sphere of action." If the several powers entrusted to, and exercised by, the United States and State governments, were executed by one sovereign or government, it would be an absurdity to tax the public property or means used to execute one of its powers or functions to support another. What would be gained by taxing a mint or fortification built and sustained by public taxes, in order to build a court-house or other public building or institution, erected and sustained by the same means? Is it more reasonable

that such a conflict of taxation should exist, where the people have distributed these sovereign powers to two distinct governments? But suppose it to exist, could it be tolerated that either of these sovereigns to whom these powers were intrusted should treat the other as a mere private corporation? That one should seize, distrain or levy on the public property in possession and used by the other? That the United States should tax the state-house at Harrisburgh, and seize the furniture of it while in use by the legislature of Pennsylvania? Or that a county or township tax collector should levy on the cannon in a fort, the bullion in the mint, or the soldiers' horse and arms? What an absurd conflict would thus be exhibited, where one arm of power exercised for the benefit of the people, should thus be employed to paralyse another.

Whatever, therefore, may be the power and right of a State to tax *all land* within her territory and make it contribute to the burdens of the State, it cannot enforce the payment of them from the United States by seizing the personal property or means used by the general government in performance of the duties and in execution of the powers intrusted to it. To the extent of the powers granted, the United States are sovereign, and cannot be treated by the States as a mere corporation, a citizen, or a stranger, and subjected to distress and execution for claims real or pretended, by every county and township officer. If the State of Pennsylvania has any just demand against the government of the United States for the use of her soil, recourse may be had to Congress, to whom an appeal for justice can always be successfully made, especially when the appellant is a

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The Court's Opinion.

2d Point.

State of the Union. There is no necessity for this humiliating spectacle of petty officers of a State distraining or levying on the public property of the general government and treating it as a petty corporation, or an insolvent or absconding debtor.

For this reason alone, the Court would feel justified in decreeing the injunction in this case to be made perpetual; but we deem it proper to vindicate the State of Pennsylvania from the charge of having authorized any of her officers to assume the powers which the respondent claims a right to execute.

3d Point.

3rd. The fact that the legislature of Pennsylvania ever intended to authorize the taxation of the few acres of ground occupied and used by the government of the United States for mint, custom-house, navy-yard, arsenal, and barracks, has heretofore at different times been assumed, but to my mind, has not been satisfactorily proved.

The act of 1834 for laying county rates and levies, and that of 1844 which makes provision for a state tax, do not differ very materially in their enumeration of the subjects of taxation. But as the latter is evidently intended to be the most stringent and comprehensive, it will be sufficient if we can show that it does not, on a proper construction of its language, necessarily include lands used by the United States for the *public benefit* and as means of executing the powers intrusted to them by the people.

Referring to its language, it cannot be denied that the mint, the navy-yard, garrison, &c., are "*real estate*," and that the word *land* in its widest legal acceptation might include them. But I need not cite cases to show the injustice and absurdity that would often arise from construing every word of a statute in its

absolute or largest sense; or that the preamble, the subject-matter, the object, aim, policy and spirit of the *whole* act should be sought for, and the *letter* of any particular section or sentence made subservient to them. It is among the earliest rules of construction that "when statutes are made, there are some things which are exempted or *foreprized* out of the provisions thereof, though not expressly mentioned."* When general terms are used and the statute enumerates, as the Statute of 1844 does, the particulars under a *videlicit*, it shows the intention of the legislator to limit the comprehensiveness of the general phraseology to the particulars enumerated, and those *ejusdem generis*. Thus we find that the whole perview, policy and aim of this act, is to raise a revenue from *private property*. No mode is pointed out whereby a tax can be collected from public squares, court houses, poor houses, forts, arsenals, &c. The terms "*all other real estate*," should therefore be construed to mean, all other real estate *ejusdem generis* of that enumerated. I need not repeat the enumeration to show that every article in it is *private property*. The property referred to as exempted by law, are "grave yards, churches, charitable and literary corporations," all *private property*. Things in the service of the people or public are never specially mentioned or excepted in any act imposing taxes, because the absurdity of such an application of their terms could never be anticipated. Can the assessor of the county in which they are, demand a county, poor or road tax on the public buildings at Harrisburgh? Have the public squares in Philadelphia been taxed for State, city or county purposes? Do the county jails and court-houses pay taxes for the

* Reniger v. Fogossa, Plowden, 13 b.

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3d Point.

support of the boroughs within which they are situated? Yet these are all included in the comprehensive term "real estate;" but "they are exempted or foreprized from the provisions of the statute by the law of reason," and because it would be absurd to suppose that an act to raise revenue from private property for public purposes, should be construed to embrace property already dedicated to public use, or purchased or paid for by public money.

* Piper v. Singer, 4 Sergeant & Rawle, 354; The President v. Frailey, 13 id. 422.

Pennsylvania cases* show that these general terms in the tax laws refer only to private property; *things enumerated "et alia similia;"* and that courthouses and bridges are not subjects of taxation though not specially exempted. The people of Pennsylvania are also citizens of the United States. The government of the United States is no alien here. It cannot be ignored, or treated as a mere corporation. The mint, the navy-yard, &c., are means to advance the prosperity, and defend the property and persons of the people of Pennsylvania, and may truly be called *public property*. State laws laying taxes on private property for public uses should not, from mere general or vague phraseology, be construed to include the property of the United States. A State ought not to be presumed to intend the exercise of a *doubtful* right, unless such intention is plainly set forth. When an officer claims a right under State authority to arrest the armaments or troops of the United States, to seize the horses and arms of her officers and soldiers (as in this case), he should be sure that he has the authority of the State for so doing.

The Court is pleased to find that the legislation of Pennsylvania has not enumerated either the mint, navy-yard, arsenal, forts, or any other property held

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The Court's Opinion.

3d Point.

for the public benefit by the United States, and has therefore not intimated an intention to authorize her officers to interfere with the general government in the exercise of its constitutional powers. If it is the will of the people of Pennsylvania to insist upon the still *doubtful* right of taxing the *few acres of land* used by the general government for the public benefit, it will be easy for their legislature to express such intention in plain language, which cannot be misconstrued: and when the question of power is fairly raised, it will have to be decided. In the meantime, county, city and township assessors and collectors should refrain from making demands which they have no clear right to make, and *certainly* none to enforce in the manner attempted by the respondent in this case.

The people of Pennsylvania feel that the location of the *mint, navy-yard*, &c. within their territory, is a benefit and not a burthen. A power to tax is a power to destroy. For all that can be gained by the exercise of this power, it will hardly be worth while to contest the right, or insist on a demand which implies a *power*, if not a *wish*, to expel these institutions from her borders.(A)

LET A PERPETUAL INJUNCTION ISSUE.

Perpetual Injunction awarded.

[APRIL SESSIONS, 1851, NO. 10, EQUITY DOCKET.]

(A) There was nothing shown in this case, nor anything shown in the pleadings, as to whether or not these barracks had been purchased by the United States, *by consent of the legislature of Pennsylvania*. In cases of such purchases the legislature of that State may perhaps be considered as having itself declared that it does not consider that it has any power either to impose or authorize a tax. The question came before it in 1834. The assessors of taxes for Alleghany county, acting under the advice of counsel at Pittsburg, in Pennsylvania, laid a tax on an arsenal of the United States near that city. The land on which the arsenal stood had been bought by the United States from a private individual, and the

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legislature, by an act of March 19, 1816, enacted, "That the consent of the legislature of the Commonwealth of Pennsylvania is hereby granted to a purchase, &c., lately made." *Providing*, that this shall not be so construed as to "impede or prevent the execution of any process, civil or criminal, under the authority of this State." Payment of the tax having been refused, the late Colonel Bomford, colonel of ordnance, transmitted the matter to the Secretary of War of the United States, who addressed himself to the Governor of Pennsylvania. After saying that the power claimed is "certainly very doubtful, and that the attempt to exercise it might lead to a troublesome litigation, or to an abandonment of the position," the Secretary states that he is directed by the President to request the Governor "to submit the subject to the consideration of the legislature of Pennsylvania, in the hope that a declaratory act will be passed expressly exempting this property from taxation." The Governor referred the matter to the legislature, whose action was determined by the following report, which appears on their Journal:

"Mr. Wallace, from the committee on the Judiciary System, to whom was referred the message of the Governor, &c., made the following report, viz: That in the opinion of the committee, it is perfectly clear that the Commissioners of Alleghany county have no authority to impose any tax upon the property in question. By an act passed on the 19th March, 1816, the legislature of Pennsylvania gave its consent to the purchase by the United States of this property. By the Constitution of the United States, it is provided that Congress shall have power to exercise exclusive legislation in all cases whatever over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. The Commonwealth of Pennsylvania, then, can exercise no legislation over the property in question. The legislature could not impose a tax upon it; nor can she authorize the county authorities to do it. But the committee do not recommend any legislative action on the subject. To declare the construction of the Constitution belongs to the judiciary, not to the legislature. To now pass an act in terms exempting the property from taxation, would imply that it was not heretofore exempt; which in the opinion of the committee it most certainly was. They submit the following resolution, viz:

"*Resolved*, That the committee be discharged from the further consideration of the subject."

GRUBB V. BAYARD.

[COVENANT: LICENSE, OR PRIVILEGE AS DISTINGUISHED FROM GRANT.]

[INDIVISIBILITY, EXTENT, AND EXCLUSIVENESS OF PRIVILEGE OR GRANT.]

Where one owning a large tract of land, grants, bargains and sells part of it, and for himself, his *heirs, executors, and administrators*, covenants, promises, grants, and agrees, with the grantee, his *heirs and assigns*, that he and they may dig, take and carry away *all iron ore to be found* within the ungranted part of the tract, paying so much a ton, this is not a grant of the ore, but of a right or privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised.

The right is without stint, but is not exclusive of the owner of the soil.

It is indivisible, and an assignee of it, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil.

Ap'l Sessions, 1851.

Statement.

DAVID FOREE, by deed of indenture made in 1769, reciting his title to 302 acres of land, grants, bargains and sells 20 acres of it which are described, to William Bennet; leaving 282 acres still his own property, in regard to which the indenture contained the following covenant: And the aforesaid David, for himself, his heirs, *executors and administrators*, doth *covenant, promise, grant and agree* to and with the aforesaid William, his heirs and *assigns*, that he, the said William, his heirs and assigns, shall and may, from time to time, and all time hereafter, *dig, take and carry away all iron ore to be found within the bounds of the said David's tract of land containing* 282 *acres*, provided he, the said William, his heirs and assigns, pay unto the said David, his heirs or assigns, the sum of six pence, Pennsylvania currency, per ton, for every ton taken from the premises of 282 acres aforesaid."

The deed was a technically and well drawn instrument containing all the formal or orderly parts of a

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Statement.

deed enumerated by Lord Coke:* and the covenant above quoted followed after the *habendum* and *tenendum*. Bennet being dead, the plaintiff purchased the interests of ninety-*four* of ninety-*nine* of his representatives, and the defendant having become owner of the 282 acres reserved, and having taken away many thousand tons of iron ore, this action on the case was brought by the plaintiff against him. It was admitted that the ore taken by the defendant was found, mined and dug by himself or his servants: and it appeared that neither Bennet nor his heirs, nor the plaintiff had ever had actual possession, use, occupation or enjoyment of the right granted by the deed of 1769, nor been in any way hindered in the enjoyment of it *otherwise* than by the defendant's taking ore in the manner just stated.

* Coke Littleton, 6. a.

The declaration which contained numerous counts, founded the plaintiff's right to recover on his being "lawfully possessed of a certain right and privilege to dig, take, and carry away iron ore to be found within the bounds of a certain tract of land *to the exclusion of the defendant*," or as being "lawfully possessed of a certain *exclusive* right or *several* privilege to dig, take and carry away iron ore to be found within the bounds of a certain tract of land;" and charged the defendant with unjustly hindering and preventing the plaintiff from digging, taking away the iron ore to be found within the bounds of the tract, and also wrongfully taking large quantities of ore from said tract, &c. All the counts asserted in some form a right which was *several or exclusive in the plaintiff:* none of them representing him as a tenant in common with others: and none of them alleging a 'surcharge' by defendant. The plea was

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Not Guilty: there being no plea of any sort in *abatement* for the nonjoinder of the remaining representatives of Bennet, whose rights the plaintiff had not acquired.

Upon these facts, a verdict having been given for the defendant, the following questions came before the Court on a motion for a new trial:

I. What was the nature of the right granted by Foree to Bennet?

II. Was this right—whatever it was—exclusive? so making it unlawful for the owner of the land to dig in it for ore, as well as the assignee of Bennet.

III. Was this right divisible or susceptible of apportionment; so that the plaintiff having but 94-99ths of it could maintain this action?

The case was thoroughly argued by *Thomas Sergeant* and *Mallery* for the plaintiff, and by *Dallas* and *Penrose* for the defendant.

For the Plaintiff, May 1st & 3d.

In favour of a new Trial. The meaning and effect of the words quoted from the deed, have in some degree been settled by the Supreme Court of Pennsylvania in a case* where this same deed was under consideration, although the point here raised was not the one in that case. Judge Rogers there speaking of this deed, said: "It is a grant of twenty acres of land in fee simple, and also *a grant of an incorporeal hereditament, for a distinct and different consideration in the remaining part of the tract* of two hundred and eighty-two acres. *The right to raise ore is an incorporeal hereditament, granted for a valuable consideration,* and *is not,* as has been contended, a *license* revocable at the will of the parties." The grant makes an estate in the land.

*Grubb v. Guilford, 4 Watts, 223, 246.

Ap'l Sessions, 1851.

For the Plaintiff.

Then the grant is *exclusive*. Bennet, his heirs and assigns, may "dig, take and carry away *all iron* to be found" within the two hundred and eighty-two acres. These words are essentially different from those in Lord Mountjoy's case which will be relied on by the other side. How can one man dig, take and carry away "*all iron*,"—not which *he* may find, —but which is "to *be* found" within a certain tract, consistently with the same right in another man to dig, take and carry all or any of it away? If one man grants to another a right to put in his cattle on a certain field to depasture the whole field and eat up *all* the grass on it, could he himself afterward depasture the field with *his* cattle? and if not enough for the cattle of both parties, bring an action against the other for surcharging the common?

IV. The grant is susceptible of apportionment, or if not, whatever objection can be raised from the want of the 5-99ths not acquired, can be raised only by plea in abatement. The evidence shows that the plaintiff has 94-99ths: he holds in common with those who hold the remaining 5-99ths: and tenants in common may sue severally. Any objection to their doing so must be taken by abatement.

For the Defendant, May 2.

Against a new Trial. The declaration asserts an exclusive right in an entire thing. The evidence shows a right to 94-99ths only, of the thing. But it is a thing which is not divisible. If it were divisible, the same party might be harassed by infinite actions. It is not a question of pleading or parties, but one of title. The title laid varies from that proved. No title is proved.

II. The language is that of a personal covenant,

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For the Defendant.

not of a grant at all. It does not bind the grantor's heirs and *assigns*, but his heirs, *executors and administrators*. It is not in the granting part of the deed; but in the place where, as a covenant, it ought to be. The grant was complete: the *habendum and tenendum* had been declared, and this part follows both. It is a license to go on the soil, to dig and take away all the ore he can find, and it is nothing more. In *Doe* v. *Wood*,* in the K. B., 1819, the owner of land granted for twenty-one years to A. and "his partners, fellow-adventurers, executors, administrators and assigns, *free liberty*, license, power and authority to dig, work, mine and search for tin, tin-ore, &c., and all other metals and minerals whatsoever," within certain limits: and the same "there found" to raise and dispose of, subject to certain reservations; and within the limits to make such adits, shafts, &c., and to erect such sheds, engines, and buildings as they should from time to time think necessary or convenient, together with the use of *all* such water and water-courses within the limits as were not already granted to others, &c. Excepting to the grantor, his heirs and assigns free liberty of driving any new adit from any adit driven or to be driven "*within the lands thereby granted*," and of entering into and driving such new adits through the same into any other lands of the grantor. The indenture contained a covenant for payment of an eighth share of the ore, and a proviso that on failure the grantor, his heirs and assigns might re-enter "*upon the lands*," to "have again, repossess and enjoy them." On ejectment brought by A., the grantee, the question arose whether the deed operated as a license only, or as an actual demise of the metals, and conveyed a legal estate in them dur-

*2 Barnewall & Alderson, 724, 743.

Ap'l Sessions, 1851.

For the Defendant.

ing the term as a chattel real. Chief Justice Abbott relied much on the fact, that the deed, though inaccurate, was a regular, formal deed. The granting part, whose office it is "to comprehend the certainty of the tenements to be conveyed," did not purpose to lease the lands, and though a subsequent part of the instrument spoke of the *lands* as granted, yet these being among 'covenants' or 'clauses,' the expressions were to be attributed either "to want of care and caution in the preparation of the deed," or if not, could "have no further effect than to show that the grantor who used them, *supposed* that the soil or minerals and not a mere liberty or privilege passed by his deed." *Muskett* v. *Hill*,* decided in the C. P. after this case, will be cited to destroy its value; but in that case there was "an express proviso in the original grant, that the licenses and authorities should be assignable by deed;" a fact which the Court speaks of as "not unworthy of observation."

* 5 Bingham's New Cases, 694, 708, 712.

III. The right in the grantee, whether license, privilege or grant, is not exclusive of the owner of the soil. Being but a right to all the ore the grantee can find, dig and take away, it is consistent with the owner's right to such ore as he can find, dig and take away. It is like a common *sans nombre*. There is no allegation nor proof, that the defendant has surcharged by digging *more* than he ought. Indeed the right laid would be inconsistent with such allegation or proof. The declaration lays throughout an exclusive or several right.

IV. But this whole case has been settled by the English Courts in the *Lord Mountjoy's* case, so long ago as the reign of Elizabeth. It is in all particulars our case, and being so, and not to be departed from

For the Defendant.

without overturning what has been established law for near three centuries, we press it as conclusive. The case is well reported by Anderson,* C. J., of the Common Pleas, one of the judges who decided it, and who quotes the words of the deed. It is reported also by Leonard,† and by Lord Coke,‡ who was Lord Mountjoy's counsel; and in the book called Godbolt's Reports,§ there is a report of it by some one, who seems to have been present at the decision. It is also reported by Moore,‖ as Coke stated it in the Exchequer soon after the decision. The case therefore is well vouched. It was in the 25th of Elizabeth, "the Augustan age of our old common law learning:" and it was thoroughly considered. It first arose before the Privy Council, and was referred by them for a certificate of opinion to C. J. Anderson, and Judge, afterwards Chief Baron Peryam, who returned a certificate of opinion in writing, which we have in Anderson. They say that they "*divers times* conferred thereof not only between ourselves, but with some other justices," who were C. J. Wray, of the K. B., Chief Baron Manwood, "*et autres*," including, as appears from Godbolt, the Lord Chancellor. On certain points referred by the Privy Council, they and the "others that conferred," were "very doubtful and cannot agree." On others they were of one opinion. Lord Coke thus reports the decision. "The Lord Mountjoy, seised of the mannor of Canford in fee, did by deed indented and inrolled, bargaine and sell the same to Browne in fee, in which indenture this clause was contained. Provided always, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heires and assignes, that the Lord Mountjoy, his heires and assignes, might dig for

* Anderson, 307.

† 4 Leonard, 147.

‡ Coke Littleton, 164, b.

§ Godbolt, 17, 18.

‖ Moore, 174.

Ap'l Sessions, 1851.

For the Defendant.

ore in the lands (which were great wasts) parcell of the said mannor, and to dig turfe also for the making of allome. And in this case three poynts were resolved by all the judges. First, that this did amount to a grant of an interest and inheritance to the Lord Mountjoy, to digge, &c. Secondly, that notwithstanding this grant Browne, his heires and assignes might dig also, and like to the case of common *saums nombre*. Thirdly, that the Lord Mountjoy might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the Lord Mountjoy, &c., assigne his interest in any part of the wast to one or more, for that might worke a prejudice and a surcharge to the tenant of the land." Anderson, it is true, takes no notice in his certificate of the point of indivisibility, nor does he state it as a question referred from the council. But Godbolt and Leonard each confirm Lord Coke, by stating expressly that the Court held, that the Lord Mountjoy *could not divide the interest*, viz., 'to grant to one to dig within a parcel of the said waste.' Anderson gives the words of the deed which much resembles ours. Lord Mountjoy "did license and authorize Richard Leycole for and during the term of 31 years next, to *search, open, dig, cast up* and *work* for ALL manner of mines, minerals, mettals, liquors and commodities whatsoever *in any of the mines, minerals and possessions whatsoever*, of the said mannor," and *the same to convert to his use during the said term*, yielding therefor yearly to the Lord Mountjoy the full moiety or one half, &c.

Guilford v. *Grubb*, cited on the other side, is no adjudication on the point before us. That case decided

that the right in the 282 acres is not appurtenant to the 20 acres conveyed, so as to pass by a sheriff's sale of the latter. Ap'l Sessions, 1851.

Reply. *Muskett* v. *Hill* destroys *Doe* v. *Wood*. In the former case the Court say, that the indenture in *Doe* v. *Wood* does not differ substantially from the one before them. They yet declare that the latter operates not merely as a license, but as a grant; a doctrine in which they show that older cases confirm them.* Reply, May 3d.

The indivisibility of the grant is supposed to be decided by the Lord Mountjoy's case. Anderson is the only reporter, who had, certainly, any personal knowledge of that case. He reports it particularly, but makes no mention of the point of *indivisibility*. His report shows that it did not arise at all. Leonard's Reports and the book called Godbolt were both published by the same person, one Hughes, and the reports of this case are probably copied one from the other; or probably, as appears in Godbolt, both from Coke himself, who was counsel of Lord Mountjoy. Coke does not *report* the case at all. He merely states it in commenting on Littleton, and many years after the judgment was given.

In respect to the exclusiveness of the grant, the language of the deed in Lord Mountjoy's case is essentially different from that here. "To dig, take and carry away *all iron ore to be found*," is a different thing from to "search, open, dig, cast up and work for ALL *manner* of mines, &c., and the same to convert to his own use," &c. The first gives all ore of a certain kind: the second as much as he can find of all *manner* of ore.

*Thomas v. Sorell, Vaughan, 351; Palmer's Case, 6 Reports, 25; S. C. Croke Eliz. 819, under the name of Basset v. Maynard; Grantham v. Hawley, Hobart, 132.

Ap'l Sessions, 1851.

Opinion of Kane, J. May 13th.

KANE, J. Is there anything in the deed which asserts, that Foree intended to do more than enter into the ordinary covenant that, so long as there was iron ore on the 282 acres, Bennet and his assigns might work it if they chose, on paying a certain price per ton? I find the legal and apt phraseology in which a lawyer might embody such a covenant, and nothing more. The indenture in the case of *Doe* v. *Wood*, quoted at the bar, seems to me to resemble the grant of an exclusive incorporeal hereditament, much more than the covenant before us. It was contended in that case, that it should be regarded as a lease, and there was much in the words that gave countenance to such an interpretation. Thus it was argued, that the "full and free liberty to dig all metals and minerals, throughout the demised lands," was tantamount to a sole grant of all the minerals, since two individuals could not both have full liberty so to dig; that the exclusive right which was engaged for to the adits or shafts, amounted to an exclusive right to the ore, for the ore could not be got out except by the adits; that the right to erect sheds, to make water-courses, and use all the water on the land, showed that an interest passed in the soil; that the limited powers which were reserved to the lessor pending the term of passing through the mines for the purpose of working other mines adjacent; and and still more the right of re-entry, in case of breach, which was specially set out in the deed,—all assume that while the term continued the grantee had an estate; and that this was supported by the language in many parts of the instrument, which spoke of the "land hereby granted," the "ground and premises hereby granted," the "land or ground hereby grant-

ed," &c. The Court was of opinion that the indenture amounted only to a license to dig and work; and Chief Justice Abbott, while he admitted that formal words of demise were not necessary to pass such an interest in the soil as was claimed, added that, whatever doubts the expressions referred to might cast, they were not sufficient to vary the construction of the granting words, which of themselves were not of doubtful import, and that they could not operate to extend the grant, by converting the things granted from chattels personal, when gotten into a chattel real previously to their being gotten.* The case in Bingham, which the plaintiff's counsel refer to as destroying the value of *Doe* v. *Wood*, was a case of mutual and well-guarded covenants, which not only authorized the licensees to raise ore, paying therefor a certain toll, but also bound them to do so with a prescribed degree of energy and effect under penalty of a forfeiture—a circumstance of much importance in determining the intent of the parties; besides which, they must have contemplated the grant of an assignable interest, for they had covenanted that the license might be assigned by deed.

* P. 740, 1.

II. But regarding Foree's covenant as an operative grant, what is the right that the plaintiff could claim under it? He says that it is not a right of common, but a right that excludes the owner of the soil. I think he is wrong in this. I should rather call it a right of common, even though it excluded the owner of the soil; that is to say so far as the policy of the law permits him to be excluded. Common is a right or privilege, says Sir Matthew Hale,† which *one* or more persons claim to take and use in the natural produce of another man's land. It may therefore be

† Abr. Tit. Common.

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exclusive, or rather sole; for the grant, or the prescription or custom, may be in favour of one man only. But it can never exclude the lord of the soil from his reasonable participation. In *Procter* v. *Mallorie*,* Coke, J., says—"Notwithstanding a grant of common *sans nombre* the lord may common with the grantee; and moreover the grantee must use the common with a reasonable number." And the Reporter adds—"This was agreed to by the Lord Chancellor." And in two cases in the Year-books, which I cite from Rolle's Abridgment,† the same position is affirmed. The owner of the soil, it is there said, hath such an interest in the soil, that though he grant a right of common *sans nombre*, yet the grantee cannot use the common with so many cattle, that the owner cannot have common enough for his own cattle. And Coke adds,‡ that "a custom or prescription totally to exclude the owner of the soil is unreasonable, and void as against law; because it was implied in the first grant that the owner of the soil should have common also." One of the points agreed in the case of the Lord Mountjoy, was based upon this doctrine; where it is said, that notwithstanding the grant of the right to dig, &c., to the Lord Mountjoy, the grantor, his heirs and assigns, owners of the soil, might dig there also; "like to the case of common *sans nombre*." And the same is relied upon as undoubted law by Lord Ellenborough, in *Chetham* v. *Williamson*.§ In truth the only exception to its application that I have found contended for in the books, is in the case of a free fishery, mooted in a case in Salkeld,‖ and discussed in Mr. Hargrave's note on Coke's Littleton, 122.

*1 Rolle's Reports, 365.

† Title A, Common, Pl. 2; and Title I., Common Sans Nombre, Pl. 5.

‡ Coke Littleton, 122 a.

§ 4 East, 469.

‖ P. 637, Smith v. Kemp.

III. But would such a hereditament as the plain-

tiff claims to have, be susceptible of apportionment? He claims that it is a right in gross; I have given my reason already for regarding it as a right in common. A right of common in gross *sans nombre*. Can such a right be apportioned?

The leading case upon this question, is that of the Lord Mountjoy stated in the argument of the counsel, and just now referred to by me. This case throughout, bears on the question before us. It denies that the grantee of a right to mine, can either assign his right to a third person for a part of the tract, or so assign an undivided interest in his right for the whole tract, as to confer on the assignee a several right to mine; and by the reason which it gives for a continuing right to mine, in the grantor, notwithstanding his grant to another, it shows that the case would not differ, whether the original mining grant were or were not in its terms exclusive, for it refers to the analogy of a common *sans nombre*, in which, as we have seen, the owner of the soil cannot be excluded, but may complain that he is surcharged, even against his own grantee, of common unlimited. In other words, the case decides that a right in gross to mine, whether in terms exclusive or not, is essentially integral, and not susceptible of apportionment. And this may be the meaning of Treby, C. J., where he says;* "although a common *sans nombre* may be granted at this day, yet such grantee cannot grant it over." And a similar explanation may perhaps reconcile the opinion expressed in Sheppard's Touchstone, p. 238, to the same effect with the remark of Treby, and the case in the Year-book, 18 Edw. 4, 84, which the annotators cite as in opposition to their text. The incorporeal hereditament may well be assignable,

* Weekly Wildman, 1 Ld. Raymond, 407.

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and yet not apportionable. The assignment may have legal effect, but if it be to more than one, the assignees take together an indivisible entirety. Such I apprehend to be clearly the law laid down in Lord Mountjoy's case, and I have no reason to suppose that the law of England is different at this day. To the same effect is *Leyman* v. *Abeel*, in New York,* the points decided in which are well condensed in the syllabus. "The grantee in fee of a right of common in gross and without number, may alien it, and it descends to his heirs, but it cannot be aliened in such a way as to give the entire right to several persons, to be enjoyed by each separately; and where it descends to several persons, as tenants, in common, or parceners, it seems that it cannot be divided between them, but that there must be a joint enjoyment of it; nor can one of the tenants alone convey a right in the common, but they may jointly aliene their rights." The same principle is carried out in *Van Rensselaer* v. *Radcliff*;† where Chief Justice Savage decides that "common of estovers, if divided by the act of the party, is extinguished; if by descent cast must be exercised by the heirs jointly." The extinguishment of the right by an assignment of it in part is, I suppose, deduced from this consideration, that the right being essentially an entire one, and the whole neither passing to the assignee nor continuing in the assignor, it remains no longer in any one.

* 16 Johnson, 30.

† 10 Wendell, 639.

And all this is in harmony with the ancient law of qualified and incorporeal hereditaments. Thus a condition may not be apportioned, but is determined by license as to part.‡ And a right of way in gross doth not pass to several by assignment; and though

‡ Dumpor's Case, 4 Reports, 119 b; S. C. 1 Smith's Leading Cases, 15.

a rent charge may be apportioned, as by an apportionment of the soil, in respect to which it is reserved, or so far at least, that parceners may take it,* or a rent service, for it is to the advantage of the lord,† as parceners may also take a corody certain, or an advowson, or a right of mill certain; yet this is only where the division of the inheritance would not prejudice another, for in the case of estovers or corody uncertain, or piscary or turbary *sans nombre*, there can be no apportionment; and the reason why parceners take in such case at all, seems to be, that they make but one heir in law, and therefore they must join in actions real, and if disseised, in one assize.‡ As they must also join, (and so must tenants in common, *qua* parceners under our American statutes of descent,) when damages are to be recovered for a *tort* done to their lands.§

* Coke Littleton, 164 a, 165 b.

† Doe v. Meyler, 2 Maule & Selwyn, 276.

‡ Coke Littleton, 164 a.

§ Daniels v. Daniels, 7 Massachusetts, 137.

I take, then, the law to be, that if an incorporeal hereditament passed by the words of Foree's covenant to Bennett, it was one not susceptible of apportionment; that it passed by his death to his heirs jointly, and can only be enjoyed by them jointly, and as one tenant; that the assignees of the heirs stand in no better plight than the heirs themselves, and can have no separate enjoyment of the mining right, and that neither heirs nor assigns, nor both, can claim to exclude the heirs and assigns of Foree, owners of the soil, from a right to dig ore in common with them.

3. There remains the third inquiry, Can this suit be maintained, on proof of an apportioned interest, the defendant not having pleaded an abatement?

The plaintiff claims not as a tenant in common with others, but as the exclusive owner of a several

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right; and he cannot now turn round, and asserting a tenancy in common instead, exclude the defence from showing that he does not legally represent the interests which on this amended view of his title should have united in the institution of the suit. The right which he asserted was an exclusive one in himself, according to some of the counts, and one that excluded the defendant according to the others. And in one form or the other, it was the basis of his suit. The case fails unless his proofs support this exclusiveness of claim.

Opinion of Grier, J. May 13th.

Grier, J. Assuming, for the argument, the plaintiff to be the assignee of the whole right which was vested in Bennet, and that it is a *grant* upon sufficient consideration, let us inquire, what is granted? Not the iron ore. This the plaintiff properly admits in his declaration, where he defines his interest under the deed, as a "*right* and *privilege* to dig, take, and carry away *iron ore to be found*" in the land of defendant. If it had been a grant of an absolute property in all the iron ore in the tract, the deed would have been insufficient to confer title without livery of seisin, and the statute of limitations a bar to the claim. A right or privilege to dig and carry ore from the land of another, is an incorporeal hereditament,—a right to be exercised on the land of another. It is a license irrevocable, when granted on sufficient consideration. It may be demised for years or granted in fee: it is assignable. The grantee or assignee of such a license, right or privilege to be exercised in the land of another, has no such title to the ore that he can support trover against the owner of the land for ore or coal raised by him.* On this subject I may adopt the

* Chetham v. Williamson, 4 East, 476.

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words of Lord Tenterden in one of the cases relating to mines, quoted at the bar.* "This indenture in its granting part does not purport to demise the land or the metals or the minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed when the intent is to demise the land or metals or minerals. But the purport of the granting part of this indenture is to grant for the term therein mentioned, (here in fee,) a liberty, license, power, and authority to dig, work, mine and search for metals, minerals, in and throughout the lands described, and to dispose of the ore, &c. *that should be found within the term*, to the use of the grantee, &c. Instead, therefore, of parting with or granting all the ore that was then existing on the land, its words import a grant of such parts thereof as should, upon the license or power given to search and get, be found within the described limits; which is nothing more than a grant of a license to search and get, (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest."

* Doe v. Wood, 2 Barnewall & Alderson, 724, 738.

2. Is the right granted, one that is exclusive of the owner of the soil? Much stress has been laid upon the word *all* in this grant, as having the effect of making it exclusive. But so important a restriction cannot be deduced from so equivocal an expression. The deed has been drawn by a very able conveyancer. He seems to have had Lord Mountjoy's case in his mind at the time. He employs none of the apt and well known terms or phraseology to indicate an intention of giving an exclusive right as against

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the grantor himself. The grant of a right to dig, take and carry away "*all*" iron ore to be found within the bounds, &c. shows the extent of the license, but not its exclusiveness. The grantee may dig, take, &c. of *any* or *all* the ore he can find on the land, but he has no exclusive right in *any* of it till he *finds it* and *digs it.* It is a right without stint as to quantity, and Lord Mountjoy's case likens it to the grant of a right of common *sans nombre* which does not exclude the owner. This is a point decided in Lord Mountjoy's case as reported by Coke, Leonard and Godbolt.

3. Did the evidences given by the plaintiff support the allegation that he was possessed of the *exclusive* right to dig, &c., assuming that the deed in question conferred an exclusive right on Bennet to dig, take, and carry away the iron ore on this tract of land? The right, license or liberty granted to Bennet is in its nature one and indivisible. Unless the plaintiff is clothed with the *whole* he has *nothing.* As of other things indivisible, it may be held by one or more as joint tenants. But they hold *per my et per tout,* (not as Blackstone has erroneously interpreted it, "by the half or moiety and by all,") but "by *nothing* and by *all,*"* or, in the language of Bracton, "Quilibit *totum* habet & nihil habet, scilicet totum in communi et nihil separatim per se." As a right to be exercised in the land of another it is an indivisible unit. Whether the plaintiff has 1-99th or 94-99ths makes no difference. If he has not the whole he has nothing. It is a question of title and not of pleading. The case of Lord Mountjoy is conclusive on this point also.

* 7 Manning, Granger & Scott, 452, in note.

NEW TRIAL REFUSED.

On a subsequent day the following opinion *totius curiæ* signed by both judges, was pronounced by

Opinion, Totius Curiæ, September 8th, 1851.

GRIER, J. As the opinions heretofore delivered by the respective members of this Court on the questions argued on the motion for a new trial may possibly be construed as arriving at the same result by a different course of reasoning; and may be considered as deciding the present motion *only*, without any definite opinion of the whole Court, as to the nature or construction of the covenant in the deed of 1769, we state the following propositions as ruled by the *whole Court*, in which we agree; without repeating the authorities or all the reasons which might be urged in support of them; and for which we refer to our several opinions as delivered.

1st. For the purposes of the present decision we *assume* that the covenant in question contains a *grant in fee* to Bennet and his heirs for a sufficient consideration *to be paid*.

2nd. We decide, that the thing granted is *not* the iron ore contained in the land of defendant; but an incorporeal hereditament, a right or license or liberty, well described in the plaintiff's declaration as "a right and privilege to dig, take and carry away" *all* or *any* iron *ore to be found* in the land of defendant. It is a license irrevocable, which may be demised for a term of years, or assigned in fee.

3rd. That until the grantee or his assigns exercised this privilege by *digging, taking*, &c., *iron* ore *found* in the land, they had no property *in* the ore that would support an action of trover for the same.

4th. That the effect of the word "*all*" in this grant not to give an exclusive right *as against the gran-*

Ap'l Sessions, 1851.

Opinion, Totius Curiæ.

tor. It describes the *extent* to which the license may be exercised, not its *exclusiveness.* It is a grant of a right to take ore without stint, and is aptly compared to a right of common in gross *sans nombre,* which does not exclude the lord or owner of the land out of which it is granted.

5th. That such a right is *indivisible,* and unless the plaintiff as assignee is clothed with the *whole,* he has *nothing,* and cannot support this suit as against the owner of the land.

6th. And lastly: That the case of the Lord Mountjoy as reported by several authoritative reporters, and among them, by Lord Coke in his Commentary, is directly in point on both parts of the case, and rules it. Its authority has never been questioned; and the application of its doctrines to this case results in a conclusion which accords with our reason, and our sense of justice.

[APRIL SESSIONS, 1846, NO. 13, COMMON LAW DOCKET.]

BATTEN V. TAGGERT.

[DEDICATION OF AN INVENTION TO THE PUBLIC.]

A description, by an applicant for a patent, of a machine in which he sets forth his invention to be *for a combination of machinery*, not giving notice that he claims any *part* as new, is a dedication of that *part* to the public.

After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of 1836, nor the seventh section of the act of 1837, relating to amending of patents, authorising a new patent for an invention different from that originally patented.

Ap'l Sessions, 1851.

Statement.

BATTEN obtained a patent in 1843 for a machine, specifying his invention to be for the manner in which he had *arranged and combined certain parts*, and not specifying that he had *invented* any of the *parts*. In truth, he was the inventor of one or more of the *parts*. Accordingly in 1849, under the acts of Congress hereafter quoted, he surrendered his patent of 1843, and took out a new one describing essentially the same machine as the former one did, but claiming as new a particular *part*. On this new patent he brought this suit, and having clearly shown great merit in his invention of this part, recovered heavy damages. A motion for a new trial was made, the strong ground for the new trial being that he had dedicated his invention to the public by his specification of 1843, not claiming it, and by making no claim of it otherwise until his specification of 1849.

One act of Congress* relating to patents, and above referred to, ordains, that whenever any patent shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee's claiming in his specification as his own invention more than he had a right to claim as

* July 4th, 1836, § 13.

Ap'l Sessions, 1851.

Statement.

new; if the error has arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, to cause a new patent to be issued to the said inventor for the same invention. And another act* ordains "that whenever any patentee shall have, through inadvertence, accident or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. And such disclaimer shall thereafter be taken and considered as part of the original specification."

* March 3d, 1837, § 7.

The Court's Opinion. September 11th

The Court, in an elaborate opinion by Kane, J., held that the invention having been in use six years before Batten claimed it as his, had become public; and that having become public, he could not reclaim it by his patent of 1849; that the sections of the act of Congress above quoted did not help his case; that the patentee under them might make his specification more accurate, or restrict the limits of his claim, but that his re-issued patent, taking the place of the one he had surrendered, could only be for the same invention. The invention of the part being very ingenious, the Court reluctantly entered an order of

NEW TRIAL GRANTED.

[April Sessions, 1850, no. 11, common law docket.]

CRAFT V. LATHROP.

[BILL OF PEACE.]

[EJECTMENT; PENNSYLVANIA STATUTE OF APRIL 13, 1807.]

After a question of title to lands in Pennsylvania, has been, *in substance*, three times before courts of competent jurisdiction, all of which have been of opinion against it—an opinion which this Court, also, on understanding it, concurs in—this Court will enjoin further proceedings at law, and compel the party claiming under such title to give up the evidences of it, and to make a deed of all his estate derived under them to the party whom he has been vexing. And this though the title alleged in the first suit was not formally the same as that in the second, and though in the third, the plaintiff by suffering a nonsuit prevented a verdict and judgment against him at all. The Pennsylvania Statute of April 13th, 1807, enacting that "two verdicts" and judgments thereon, in succession for the same party, in ejectment between the same parties, shall 'bar the right,' was intended to supply a want of equitable power in the Pennsylvania courts, as then constituted; and whatever it may mean, does not prevent this Court, which has complete equity powers, from giving complete equity relief in such a case as is above stated.

MAY SESSIONS, 1851.

STATEMENT.

THIS was a *Bill of Peace* to May term, 1851, in which the facts were essentially these: Steele Semple, Esquire, being in debt, died in 1813, the owner of a piece of land. One of his creditors, acting amicably and in concert with his administrator, the Hon. Wm. Wilkins, obtained judgment by consent against his estate, took this piece of land in execution, and in 1815 had it sold. Mr. Wilkins bought it in, taking the sheriff's deed in his own name; no money passing between him and the sheriff; and the purchase being made for the benefit of Semple's family: but no trust being specially declared. In this state of facts, another creditor, the Hon. James Ross, in 1819, obtained judgment against the administrator, and having kept his judgment alive till 1833, levied then on the same piece of land, had it sold, bought it

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STATEMENT.

himself in 1834, and sold it to Craft, the present complainant, who had had possession of it since 1837. Afterwards in 1842, a daughter of Semple's claiming under two titles, to wit, as one of her father's heirs, and also as heir to her mother, (Semple's second wife who had had some supposed, independent right in the land), brought ejectment against Craft in a state court, (Mr. Justice GRIER at that time presiding there and trying the case), in which a verdict and judgment were given against her. This judgment the Supreme Court of Pennsylvania affirmed on error;* declaring it to be "*clear that the sale of the real estate in dispute under the judgment to Mr. Ross, was a good and valid sale, and such as vested him with the right of his debtor thereto at his decease.*" After this, the heirs of Semple filed a bill in equity against Mr. Wilkins, the administrator, for an account as trustee of another tract of land of Semple's, which Mr. Wilkins had bought in, in the same way as this, and claimed also an account of this tract, the subject of this suit. Mr. Wilkins, in answering that part of the bill which related to this tract, gave an account of Mr. Ross's judgment, and the proceedings under it "*since adjudicated,*" as he answers, "*to be regular* and *valid* by the decision of the Supreme Court of Pennsylvania, the court of last resort upon territorial questions:" and he quotes the language already given from that decision; adding, "As it is thus *settled* that the title of Mr. Ross relates back to a period *beyond any connection of the respondent with the premises*, it is manifest that by the said sale, *all the relations of the respondent to the property were severed.*" *No exceptions were filed to this answer;* and afterwards, in 1847, Mr. Wilkins by deed reciting the purchase of 1815,

* Payne v. Craft, 7 Watts & Sergeant, 458, 465.

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STATEMENT.

and that the land then bought by him was held "in trust for the use of the creditors and children of Steele Semple," *referring to the bill in equity and his answer and account*, and reciting that "it is acknowledged that the said trusts have been satisfactorily and faithfully administered and executed," conveys to Semple's heirs "without recourse or warranty," all Semple's and all his, Wilkins's, right, title, claim and demand of, in and to the said tracts of land, "*so far as the same have not been sold.*"

Being thus clothed with Mr. Wilkins's title, Semple's daughter and the other heirs brought a second ejectment against Craft, in the same State Court, where a verdict and judgment were again entered for the defendant. On error to the Supreme Court of the State in 1848, this judgment was affirmed; only, however, by a bare majority of judges; this majority, after having declared a reluctance to regard the matter as open after its former judgment, affirming that judgment so far as it covered the old facts, and deciding that there was nothing in the title derived through Mr. Wilkins," to defeat the estate otherwise undoubtedly vested in Mr. Craft."* Being this unsuccessful in the State Courts, the parties there plaintiff, afterwards sold or conveyed the land to one Lathrop, the defendant, in this case, a citizen of Virginia; and he, in 1848, brought ejectment in this Court against Craft, where he set forth essentially the same title as the parties, under whom he held, had shown in the State Courts, and where, this Court, Mr. Justice Grier now presiding here, having charged against him, he suffered a nonsuit. Being thus out of Court, and at liberty to begin anew, the same Lathrop in 1850 brought another ejectment against Craft. His

* Hays v. Heidleberg, 9 Pen. State Reports, 203, 204.

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declaration being in the usual form, did not show under what title he now claimed; and nothing appeared otherwise to show that it was essentially different from that already exhibited by him or by those from whom he held.

On these facts, *Craft* now filed this bill against Lathrop, setting forth his case and submitting "for the consideration of this Court whether after the three repeated suits at law by said defendant or those under whom he claims—if he pretends to have any other title than was presented and judicially condemned by the aforesaid Courts, or hopes to raise any other or better title under the same rights of heirship or the same deeds, or in any other right or on any other evidence,—he is not bound to set forth the same by schedule or otherwise, so that this Court may examine the same and be *satisfied* that his fourth ejectment has some reasonable grounds upon which future litigation ought to be encouraged;" and praying, "that inasmuch as the same title and possession which, at said former trials, was vested in the complainant, remains in him, that the respondent should be restrained from proceeding in the ejectment commenced here and to pay the costs of that suit and this bill, and enjoined from commencing and prosecuting any other ejectment against the complainant's said lands at any time hereafter so that the complainant may be quieted and undisturbed by the said respondent or any one claiming under him; that the said deed to respondent and all those under which he sets up any title may be delivered into this Court to be cancelled or destroyed, and that the said respondent may be compelled to release any title or claim he sets up to the said premises, and

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that the complainant may receive such further or other relief as to this Court may seem meet and equitable."

Without reporting all the special matters of defence, which were essentially a re-investigation of the original case,—which this Court regarded as without merits—and an attack on the decisions of the Supreme Court,—the strong ground against the relief prayed for was a statute of Pennsylvania passed April 13th, 1807, which enacts, that "Where *two verdicts* shall, in any writ of ejectment *between the same parties*, be given in succession for the plaintiff or defendant, and judgment be rendered thereon, *no new ejectment shall be brought*; but where there may be verdict against verdict between the same parties and judgment thereon, a third ejectment in such case, and verdict and judgment thereon shall be final and conclusive, and bar the right."

For the Defendant.

Messrs. *David Ritchie* and *T. Williams* against the bill: Where there is a statute regulation, equity cannot interfere and set it aside. The statute of limitations must be regarded by the Chancellor equally as by the common law judge, although there are cases where the pleading of it is contrary to good conscience. Our statute with regard to ejectments is of the same class. It makes *two verdicts* and judgments on the same side in an action *between the same parties* conclusive; but the right of a party to make claim *until* two verdicts and judgments have been so had, is fairly deducible from the act of assembly, and no fair reasoning can put any other construction on it. There might, it is true, be a case where it could be shown to the Chancellor that there was an adverse

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For the Defendant.

possession of more than twenty-one years; that the plaintiff in ejectment had no shadow of title, knew that he had none, and brought his action merely to annoy; not to enforce rights he really believed himself to possess. But this is not such a case. Mr. Craft's possession is of about fifteen years only. The property in dispute is claimed by the representatives of Mr. Semple whose it originally was by the acknowledgment of all parties. The title of Mr. Ross never accrued till twenty years after Semple's death. This land has been taken from Semple's representatives by a process which, to them, appears neither just nor lawful, and they insist upon their absolute right to test the matter in every mode and as long as permitted by law. If it be said the Supreme Court of Pennsylvania has already decided the matter, the reply is, that Court has pronounced one judgment on the title here set up, and that this judgment was by a bare majority of the Court; two judges out of five dissenting. It is believed that the Supreme Court of Pennsylvania will not make a similar decision should the case again be presented. At all events the plaintiffs have a right to two judgments; and the proper time to allege the authority of that Court as a bar, will be when it has pronounced two judgments in the same way.

The acts of assembly with regard to two verdicts and judgments in ejectment have received a construction in *Brown* v. *Nickle*,* which goes farther in our way than it would be necessary for us to ask. In an ejectment where the title was really not in question, and the only dispute was the payment of a mortgage, the Court held that one verdict and judgment was not conclusive, the bare form of the action entitling

* 6 Penn. State Reps. 390.

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the party under our statute to two verdicts and judgments in one way.

For the Defendant.

But whatever injunction this Court will grant against proceeding at law or otherwise in the Courts of the United States, certainly it will not compel a surrender of our title papers, or, what is worse, a transfer of our estate by which we shall be deprived of our rights in the State Courts of Pennsylvania. There, certainly, we are not barred, because there we can be barred only technically and at law under the statute. There have not been "two verdicts" in an ejectment between *the same parties* given in succession for the plaintiff." This Court is not so greedy of jurisdiction that in a question of *real property*, a matter specially subjected to state law, it will snap after a case and clutch it away from the tribunals to which it especially belongs. At furthest, it will use its equity powers only to prevent what it deems an abuse of its law: and not to make void what *it* deems the unwise or inequitable legislation of the assembly of Pennsylvania. Any injunction must be confined, therefore, to enjoining the respondent from suing again in the Federal Courts.

For the Complainant.

Craft argued the case in person, *in favour of his bill.*

THE COURT'S OPINION.

GRIER, J. It is a maxim of the civil as well as the common law, and a rule absolutely necessary for the maintenance of the public welfare, "that the judgment of a court of competent jurisdiction, while it remains unreversed, is conclusive between the parties and privies thereto, so as to estop them from again litigating a fact once tried or found." If it were

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THE COURT'S OPINION.

otherwise, there would be no end to litigation. This rule is equally applicable to suits which affect the title to real as to those respecting personal property. A verdict and judgment in a writ of entry or a writ of right, were as conclusive in their effects, as they were in actions of debt, trespass or trover. But when the action of ejectment was substituted for real actions, by the ingenious fiction of a lease, entry and ouster, and the recovery of a fictitious term of years, it is plain, that though in fact the same issue might be tried between the same real parties, yet the record would exhibit an entirely different issue between different parties: so that the verdict and judgment on a lease, entry and ouster of *John Doe* would not technically be pleaded in bar to another ejectment, where the lease, &c., were to *Richard Roe*.

From such technical reasoning upon the fictitious forms of the action of ejectment has arisen this anomaly in the common law, and not (as has been sometimes mistakenly asserted) from any distinction made by the common law, in favour of real property. Indeed, no good reason can be given why the solemn judgment of a court of competent jurisdiction should be conclusive on personal rights valued at millions, and inconclusive when the title to realty, worth but an hundred, is in litigation.

But great as the evils of endless and vexatious litigation thus introduced by means of legal fictions, were, courts of equity were *at first* slow to interfere; Lord Cowper having, in a celebrated case,* refused to interfere by injunction, where five several verdicts and judgments in ejectment had been rendered in favour of one party. But this decision was overruled by the House of Lords, and a perpetual injunction

* Lord Bath v. Sherwin, Precedents in Chancery, 261; S. C. 10 Modern, 1.

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was decreed.* The ground of the decision undoubtedly was, that this was the only adequate means of suppressing oppressive litigation, and hindering irreparable mischief. This doctrine has ever since been steadily adhered to by courts of equity: and now wherever a right has been satisfactorily established at law, a court of equity will interfere to prevent further litigation, without inquiring particularly what number of trials in ejectment have taken place †

* 4 Brown's Cases in Parliament, 373. 2d ed. 1803.

In Pennsylvania (till lately) they had no courts of general equity jurisdiction, which could give a remedy against vexatious litigation by injunction, or by compelling the transfer or cancellation of an outstanding fraudulent or void deed, which might cast a shadow over the title of the true owner, and be used to his annoyance.

† Leighton v. Leighton, Id. 378, and 1 Peere Williams, 671-673. See Story's Commentaries on Equity Jurisprudence, § 859.

To remedy, in some measure, this evil arising from the want of tribunals with sufficient powers to administer equity, the act of the legislature of April 13th, 1807, was passed, which constitutes the real ground of defence in this case. It is not necessary to criticise the very peculiar language of this act. It has been construed to mean, that two verdicts and judgments between the same parties or privies and on the same title, shall be conclusive of the right, and a bar to any further actions. By thus making two verdicts and judgments in favour of one party, a bar or estoppel which might be pleaded in a court of law to another action between the same parties, a partial remedy was afforded for the evils arising from want of a court of equity. But in this court, which has full powers to give an equitable remedy against oppressive litigation, it by no means follows, that a party can have no other remedy than that given by

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a court of law under this statute. A litigious claimant of land may annoy the owner forever, and evade the estoppel provided by this act, by pursuing the course which the respondent in this case has seen fit to pursue. He may bring his ejectment, have a full hearing before a court and jury, and when the court has pronounced his title insufficient in law to entitle him to a verdict, he may take a nonsuit, and renew his litigation; speculating on the possible chances of a change of judges or of the law, or hoping to extort from his adversary the price of peace. The act of 1807 was not passed to confer a right of harrassing another forever with litigation, provided the party can evade two verdicts and judgments, but to give a legal remedy, defective indeed, but better than none. Equity is a part of the common law of Pennsylvania; but for want of proper tribunals it is often very defectively administered. Hence (till lately) partnership accounts could be settled only in the antiquated action of account-render; there was no mode of compelling a discovery; there was no power to order the delivery or concealment of fraudulent deeds. Specific execution of a contract could not be enforced except by conditional verdicts in actions of covenant and ejectment. Certain of the courts of law have lately been entrusted with powers to remedy some of these defects arising from want of a court of general equity jurisdiction; but as to most of them, equity is still administered with the defective and cumbrous machinery of a court of law. But the courts of the United States, labouring under none of these difficulties, through defect of power, have always administered equity in this State, as fully as in others, and have, therefore, never adopted the practice of the Pennsyl-

vania courts of endeavouring to administer it indirectly and defectively through the forms of legal actions. Hence we decree and compel the specific execution of a contract as a court of chancery, and not by an action of ejectment on an equitable title, or pursuing any of the other special and defective methods of giving equitable remedy, which necessity has compelled the legislature or courts of Pennsylvania to invent or adopt.

Our inquiry in the present case will, therefore, be, not, what remedy the courts of Pennsylvania *could* give to the complainant, or whether he has shown a statute bar as against the respondent (for then he would have no need to come into a court of equity); but, whether he has shown a case, which entitles him to relief from this court sitting as a court of chancery with full power to administer equity. Or, in other words, has the complainant so satisfactorily established his title at law, as to entitle him to invoke the aid of this Court to suppress and prevent further litigation of the same question? [His Honour here went into a minute review of the cases brought in the State Courts, and of the ejectment first brought in this Court. And while he stated that this Court did not feel called upon to enter into argument, to justify the opinions of the Supreme Court of Pennsylvania affirming the validity of Craft's title, he yet reviewed the facts of those cases minutely, and of the proceedings to account, and of the first ejectment in this Court, and expressing the entire concurrence of this Court in the principles on which these cases were founded, continued as follows:] That the complainant is entitled to the remedy prayed for in his bill, we think, cannot admit of a doubt. His title has, *in*

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THE COURT'S OPINION.

fact, been three times declared valid by the courts of law as against the claim set up by the respondent. The complainant is now harassed with a fourth ejectment on the desperate speculation, that possibly the Courts of the United States may be persuaded to overrule and reverse the decision of the Supreme Court of Pennsylvania on a question of title to real property depending on the peculiar laws of that State. The purchase and sale of stale and desperate claims for the purpose of speculation and litigation, by persons out of possession, has become so frequent, that we have constant cause for regret, that Pennsylvania has not adopted the ancient doctrine of the common law on the subject of maintenance and champerty.

We are of opinion, therefore, that the complainant is entitled to the relief prayed for,—

1st. Because his title as against that under which the respondent claims, has been thrice tried at law and decided in his favour. Twice by the Supreme Court of Pennsylvania, and once by this Court.

2nd. Because the judgment of the Supreme Court, affirming the title of complainant, and adjudging the deed of Mr. Wilkins to be void, has been made the foundation of a settlement in a chancery suit and its correctness acknowledged by the administrator and his pretended assignees, under whom the respondent here claims.

3rd. Because Mr. Wilkins after the proceedings we have stated, is estopped from setting up a claim to the land as his own, or affirming the validity of the deed to him; and the respondent in so doing, is making a fraudulent use or rather abuse of the assignment which has been purposely drawn in such form as to show that Mr. Wilkins, the administrator, laid

no claim to this property and did not consider himself as transferring any.

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THE COURT'S OPINION.

4th. Because this Court fully concur in the correctness of the decisions at law on the title in question.

And this Court doth accordingly hereby order, adjudge and

DECREE:

DECREE.

That the ejectment suit now pending on the law side of this Court, commenced by the respondent against the complainant, be enjoined, and all further proceedings thereon be stayed, and that said respondent pay all costs incurred in said suit; and that respondent be enjoined from commencing or prosecuting any other action of ejectment against the said complainant, his lessees, alienees or heirs for the tract of land described in said bill of complaint, under any title or pretence of title, vested in complainant at the time of the filing of the bill in this case, or at the time of instituting the action of ejectment hereby enjoined. And further *that the respondent do release and convey to the complainant, his heirs and assigns, all right, title, claim or demand whatsoever of said respondent to the land in dispute vested in him by and under the deeds in the bill of complaint stated and described, by a deed duly executed and acknowledged,* and to be filed in this Court within thirty days from the date of this decree. And that said deed when filed shall be recorded in the recorder's office of Alleghany county. And that in default of the said respondent's executing and filing such deed within thirty days from the filing of this decree, the clerk of this Court is hereby appointed master and commissioner of this Court to make, execute and acknowledge such a deed

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of release, and have the same recorded. And that all the costs of this suit, including those of the said releases and recording the same, be paid by the said respondent.

[AT PITTSBURGH, MAY SESSIONS 1851, NO. 1. IN EQUITY.]

THE SCHOONER MARGARET V. THE STEAMBOAT CONNESTOGA.

[COSTS ON APPEAL: COUNSEL FEES.]

On an appeal from the District Court in Admiralty where the decree of that Court is reversed here, the successful party has *costs on the Appeal*, unless new evidence was introduced above, which might have caused a different judgment, if it had been offered to the Court below.

Although, perhaps, in aggravated cases of appeal, where the judgment of the District Court in Admiralty is affirmed, the Court might add by way of taxable costs a sum for counsel fees, in this Court, yet such an allowance is not favoured. Involving the exercise of discretionary power, it is a dangerous jurisdiction and one disliked. And in the present case, although this Court had decided that the libellee was to blame, yet it refused an application to make him pay fees to the libellant's counsel.

OCT'R SESSIONS, 1851.

STATEMENT.

A COLLISION had taken place in the dark between a schooner and a steamboat, in which the schooner was sunk and lost. *The testimony was in conflict throughout;* the hands on the schooner swearing that the accident was caused by the fault of the steamboat: and those on the steamboat swearing it was owing to the fault of the schooner. The testimony in favour of the steamboat being, as he thought, rather the stronger, the District Judge, on a libel by the schooner, decided in favour of the steamboat. The schooner paid all the costs ($154) incident to

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STATEMENT.

the judgment of the Court below against her, and brought the case by appeal here, where, being well prepared, it was *twice argued on the facts*, and quite ably argued by Messrs. *Waln* and *R. R. Smith* for the schooner, and Mr. *R. P. Kane* and Mr. *H. Wharton* for the steamboat. This Court examined the testimony with more than usual attention and not believing all the steamboat's part of it, and declaring its conviction "that it is necessary to the safety of sailing vessels that steamboats be held to a rigorous rule of accountability," and that these latter "are always considered as having the wind free, and *must always give way*," and "*must shew it*," *reversed* the decree below for *error in judgment on fact*, and referred it to the clerk to assess the damages. The clerk, among other charges which he reported the steamboat bound to pay, reported, not only the $154 paid by the schooner in the District Court, on the judgment against her, and a bill of costs ($60) now first filed, as if she had been originally successful and had judgment in her favour below, *but also her costs* ($44) *in this the Circuit Court on appeal:* and, stating that the counsel for the schooner made an additional claim against the steamboat of $200 *as counsel fees* for defending the schooner, reported the amount as a fair charge, but left the allowance or disallowance of it for the Court itself. The allowance of either of these costs on appeal or the fee, as matters to be paid by the steamboat, were now the points in issue.

May 6th, and September 9th, 1851.

October 10th, 1851.

For the Costs on Appeal.

Mr. *Waln* and Mr. *R. R. Smith*, for the schooner. The costs of the appeal are like all other costs: and are to be paid by the party against whom judgment is finally given. It is no fault of the now successful

Oc'r Sessions, 1851.

For the Costs on Appeal.

party that the Court below erred in its decree: and it would be unreasonable to charge him with costs incident to appeal from a judgment which he strove every way to avert, and which *on the same facts as were presented below*, is now decided to have been erroneously given. He had as good a right to be heard on appeal as he had to libel the party at all. A recent rule of the Supreme Court of New York, varying a practice derived by it from the English House of Lords, declares that in all cases of reversal of any judgment in this Court, except for want of jurisdiction, costs shall be allowed the plaintiff in error or appellant, unless otherwise ordered. The practice, independent of rule, is the same in Massachusetts, on all reversals for *error in fact*.* The reversal here was for error in fact.

* Bullard v. Brackett, 2 Pickering, 85.

For the Counsel Fees.

On the subject of counsel fees the Supreme Court has said as follows:† "It is the common course of the Admiralty to allow expenses of this nature, either in the shape of damages or as part of the costs. The practice is *very familiar* on the prize side of the Court; it is *not less the law* of the Court in *instance* cases, it resting in sound discretion to allow or refuse the claim;" and the Court accordingly, in an instance case, regarded an allowance of $500, counsel fees, as one that was "unexceptionable." In Kentucky the principle is established that the plaintiff, in an action for *mesne* profits, is entitled to be re-imbursed in such amount as he has in good faith been compelled to pay for the restoration of the property which the defendant has wrongfully taken or withheld from him, and he may therefore recover any counsel fee which he has paid or bound himself to pay in respect to the ejectment, if such fee be not unreasonable.‡

† The Appollon, 7 Wheaton, 362, 379.

‡ Doe v. Perkins, 8 Ben. Munroe, 98, 20.

The same rule prevails in like cases in New Jersey.* In the present case the Court has decided that the steamboat alone was in fault. The owners of the schooner will lose, at any rate, their time, and will go unpaid for much trouble which they have had in prosecuting their case through two courts. They ought, at least, to be indemnified for all money actually paid in the suit. *Stimpson* v. *The Rail-Road*,† which rejected such allowances, and rightly, in patent and common law suits, admitted the distinction between such suits, and cases in Admiralty.

For the Counsel Fees.

* Denn v. Chubb, 1 Coxe, 466.

† 1 Wallace, Jr. 168.

Mr. *R. P. Kane*, and Mr. *H. Wharton*, for the Steamboat. It is extremely hard to charge the defendant with costs incident to an error not of his, but of the Court below. He is in no fault for that judgment. No statute gives costs in such cases, though statutes do in others; and the Supreme Court of Pennsylvania has held costs in cases of reversal to be so unjust that, where they had been levied by execution, it quashed the writ, and ordered the different officers to refund them.‡

Against the Costs on Appeal.

In an early leading case in New York,§ an appeal from Chancery, Mr. Justice Benson, after looking into all the cases, delivered the unanimous opinion of the Court of Errors, "That if judgment be given in the Court below against the plaintiff, and he bring error, and the judgment in the Court below be reversed, *he recovers only the costs of the action below, because the Court of Errors gives such judgment as the Court below ought to have given, and none other*; and it would be unreasonable to compel a person, in case of a reversal, to pay costs for the error of the Court below. The cases," he says, "are express and deci-

‡ Wright v. Small, 5 Binney, 204; and see Smith v. Sharp, 5 Watts, 292.

§ Le Guen v. Gouverneur, 1 Johnson's Cases, 436, 523.

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Against the Costs on Appeal.

sive."* In 1829, this case was solemnly confirmed in a chancery suit, and declared to be in accordance with the practice of the House of Lords in England.† In Massachusetts, and in Maine, the plaintiff in error is refused costs on reversal for *error in law*, though there is a statute in both States, which declares that "*in all actions* the party preventing shall be entitled to his legal costs."‡ Mr. Beames, in his treatise on Equity Costs,§ says: "It seems a *general rule*, that costs are not given where the decision of the tribunal appealed from is reversed, 'and *that very reasonably, for why should any man, in case of a reversal, pay costs for the error of the Court below?*"

* 1 Strange, 617; 1 Anstruther, 180, 183; 1 Salkeld, 262.

† Murray v. Blatchford, 2 Wendell, 221, 224.

‡ Marble v. Snow, 14 Maine, 196.

§ P. 246.

Against the Counsel Fees.

On the matter of the counsel fees. Although the judgment in *The Appollon* is that of the Court, the language quoted is in its opinion as given by Judge Story, who, in his circuit, went so far as to include counsel fees as damages in a suit on the law side of the Court. His doctrine, full before the eyes of this circuit, has been pointedly rejected by it, and is at variance with the tone of some of the best courts in the Union; those of Massachusetts, New York,‖ and Pennsylvania.¶ "The principle founded on it," says Chief Justice Gibson, "would be without bound or limit, both in the generality of its application, and the extent of its operation. A defendant sued on a plain bond, might find himself soused in damages, not only for the detention of the debt, but for the amount of a surgeon's bill for curing the plaintiff's leg, broken in a fall from his horse while travelling to Court, in order to prosecute the suit. *Where would it stop?* . . . . . No law suit is prosecuted without trouble or expense, and were compensation for these recoverable, as an original ground of action by anti-

‖ See Stimpson v. The Rail-Roads, 1 Wallace, Jr. 164, 171, and cases cited in the Court's opinion.

¶ Good v. Mylin, 8 Pennsylvania State, 51.

Oc'r Sessions, 1851.

Against the Counsel Fees.

cipation, the claim would be a standing dish, and we should have a direct precedent for it in every trial. There is many a right which is not worth the trouble and expense of enforcing it . . . . . and to pay for expenses and trouble *in order* to make it valuable, would make it the principal battle-ground." A reputable text writer* refers to *The Appollon* as a cause involving questions of great importance, affecting the rights and sovereignty of foreign nations, and speaks with disapprobation of applying its principle to "other than such as are likely only very rarely to occur:" and says that doing so "would introduce a new element of controversy, and impose on the judge a disagreeable and embarrassing duty." He adds that in the southern district of New York, extra counsel fees are not allowed except in extraordinary cases, and that no instance has occurred of such an allowance in the northern.

* Conklin, Admiralty Practice, 780.

The allowance would have no foundation in professional delicacy, good morals or policy. A fee in this Court, at least, is honorary, and cannot be recovered. So it ought to remain: and the Court will not lay down a rule which refers the counsel from his client to his client's enemy, and tends to tarnish the brightness of professional honour by allowing counsel to receive his pay not as a grateful recompense from a protected client, who knows and appreciates his service, but makes him extort it from the client of opposing counsel; a client who feels unkindly to him, and whom his own client, stimulated by success, is ready, to any extent, to assist in burdening with oppressive and unjust charges.

But *The Appollon* at furthest makes the allowance discretionary: and whatever may be the abstract prin-

Oc'r Sessions, 1851.

Against the Counsel Fees.

ciple, this case is not one for its application. The collision was in the dark. The evidence was in conflict throughout. The decision of this Court rested on a disbelief of the facts positively sworn to by one side, and on a presumption that every collision between a schooner and steamboat *is presumed by law* to be the fault of the steamboat, till she shows that it was not her fault. This presumption, however necessary to be adopted, may often be false in fact. The Court below, on the same evidence that the Court had here, thought it repelled by the testimony. Certainly the case was one of doubt. It was ordered for re-argument on facts only and the Court examined the evidence with a care more than a case not doubtful would require. It was a case on which two minds might naturally disagree; and which, under favour, comes to be decided as it is, only because one mind was in a Court below, and the other in a Court above.

The Court's Opinion. November 3d.

GRIER, J. When the judgment of an inferior Court is affirmed on error or appeal, it is of course, that the defendant in error has judgment for costs. But when the judgment of the Court below is reversed on writ of error or appeal, costs are not of course. It is said that as the appellee is not in fault for the judgment below, he should not pay the costs on appeal; but each party should be left to pay his own costs. Formerly, as there were no damages given on a writ of error, there could be no costs either at common law or by statute of Gloucester. The statute of 3rd Henry VII. ch. 10, first gave costs where a judgment was affirmed on a writ of error. That of 4th Anne, ch. 16, § 25, gave costs where a writ of

As to the Costs on Appeal.

Oc'r Sessions, 1851.

THE COURT'S OPINION.

error was quashed, but no statute gave them in case of a reversal. In Equity and in Admiralty there seems to be no other rule than the discretion of the Court, as to costs, on appeal. So far as any rule on the subject has been announced by this Court, it is only, that we would not allow costs on appeal where new evidence has been introduced above, which might have caused a different judgment if it had been offered to the Court below.* But I believe it has been our usual practice to give the party his costs here, who obtains the judgment of this Court, with the above exception only. It is true the defendant is not in default for the judgment of the Court below. And to this it may be answered, neither is the plaintiff.

* Carrigan v. The Charles Pitman, 1 Wallace, Jr. 307.

The plaintiff who recovers a debt, or damages for an injury done to him, has a right to recover also the cost incurred in obtaining his judgment. The costs on appeal would seem to form a part of these, as justly as any other, unless in the excepted cases I have mentioned, where he failed below by not producing sufficient evidence, which was afterwards produced on appeal. In Courts of law, at the present time, I believe in most instances, costs are given on reversal of a judgment. And I think also as a general rule, that where a plaintiff is forced to appeal in order to recover his debt or damages, and does not succeed in so doing, on his appeal he recovers all his costs up to the date of his decree or judgment, unless some special reason be shown to the contrary.

As to the Counsel fees.

But while this rule applies to actual taxable costs I know of no instance where we have added a large sum for supposed counsel fees. I know that it was decided, in the case cited at the bar,† that Courts of

†The Appollon, 9 Wheaton, 362.

O&T Sessions, 1851.

THE COURT'S OPINION.

Admiralty have a wide discretion to allow expenses of this nature, not only in prize, but in instance cases. The allowance is there said to rest in the *sound discretion* of the Court. I must confess my decided repugnance to the exercise of discretionary power over men's property. This principle has been introduced from *civil law Courts*. It partakes rather of the hall of the Cadi, than of the judgment seat of the Court. I have already refused to follow the practice of the late Judge Story in patent cases, and allow necessary counsel fees as part of actual damages.* "Sound discretion" is no doubt an excellent phrase in the abstract, but the exercise of it over men's property, liberty or life is sometimes called a tyrannical, not a judicial power. "Discretion" is admitted to be dangerous; but "*sound* discretion" is claimed as a different thing. Who is to judge of the soundness but the Court? And by what is it to judge when it abandons precedent and principle? "Sound discretion" is discretion as settled by rules. Otherwise it is sound only when you decide as the party seeking the decision wants. And hence in practice it would come to mean the notion, whim or caprice of the judge who exercises it. In prize cases, the money is in Court. Like plunder, it belongs to no one till it is divided, and it may be no more than right that some crumbs should fall to the share of the learned doctors and proctors who have the trouble of its distribution. I confess my decided aversion to the exercise of an arbitrary power over the property in the pockets or possession of parties in common cases. If I were to judge of the reward merited by the learned counsel on either side of this case, I should say that their labours on behalf of their respective

* Stimpson v. The Rail-roads, 1 Wallace, Jr., 164.

Oc'n Sessions, 1851.

THE COURT'S OPINION.

clients, were worthy of ample remuneration. For the case was well prepared, and well argued on both sides; and I think it due to the younger gentlemen, (who have for the first time made their appearance in this Court,)* to say, that they have defended the case of their clients, with a zeal and ability which deserved, if it did not obtain success, and which are certain omens of their future success and eminence in their honourable profession.

* Mr. H. Wharton and Mr. R. P. Kane, Rep.

The defendants in this case have acted in good faith in making this defence; and, I have no doubt, consider themselves wronged by the judgment of this Court. In all collision cases, both sides are sure they are not in fault, and they swear to it, believing it to be true. In deciding these cases, the testimony is always contradictory; much of it, though not intentionally false, is *not true*. The truth has to be *guessed out* by the Court by a careful comparison of the admissions and contradictions of the witnesses. The *last guess* may not be the right one, but he in whose favour it is, may at least be said to have good fortune, if not justice on his side.

Now I will not say that there may not be aggravated cases of appeal when the judgment below is affirmed, that this Court, in the exercise of this permitted but disliked exercise of discretion, may add, by way of penalty, to the taxable costs, a sum for counsel fees in this Court. But where the defendants, as in this case, had the judgment of the District Court in their favour, where there has been no attempt on their part to oppress the plaintiff by protracted litigation, we do not think that a case is presented, where this dangerous discretion of adding two hundred dollars to the damages should be exercised.

Oc'r Sessions, 1851.

THE COURT'S OPINION.

If the plaintiffs have fortunately recovered in this doubtful contest, they must pay their counsel, as in common law cases, out of the damages recovered, and be thankful for the balance. But for the very able and valuable services of their counsel, they would not probably have recovered anything. It is true, that civil law tribunals by the exercise of this sound discretion, or *summum jus* propose to make the complainant whole for his entire loss; but this is not always possible, and we should be careful, lest the exercise of this *discretion* may be to the opposite party *summa injuria*.

DECREE. Costs allowed and counsel fees denied.

The report of the clerk is therefore confirmed, without the addition of the two hundred dollars demanded as counsel fees.

[APRIL SESSIONS, 1851, NO. 5, COMMON LAW DOCKET.]

EX PARTE BEEBEES.

[PRACTICE: SUBPŒNA.]

Although there is an act of Congress, which allows subpœnas *ad testificandum* to run from the Circuit Courts into districts not their own, yet where the witness who has been thus subpœnaed, shews no disposition to treat the process of the Court with contempt, the issuing of an attachment is always matter of discretion with the Court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the Court will not compel his attendance; but will either postpone the cause or have his deposition taken.

OCT'R SESSIONS, 1851.

STATEMENT.

BY an act of Congress,* changing the rule of common practice, subpœnas for witnesses may run into districts, other than the one where the Court is sitting, provided the witness does not live at a greater distance than 100 miles from the place of holding the Court. And under this act the Beebees, residing at Ravenswood in New York, and out of this district, had been served in an equity suit pending at Philadelphia, in it, with a subpœna to appear before the Master *there* and testify. The subpœna which was a *duces tecum*, required them to produce before the Master, in Philadelphia, their letter-books, original letters, books, papers and vouchers, containing entries concerning gold dust, gold or other securities transmitted by the defendant, at San Francisco, since the 1st of January, 1851. Not appearing according to the requisition of the subpœna, Mr. *C. Ingersoll* now moved for an attachment to compel their attendance; but Mr. *H. J. Williams*, appearing as their counsel, and denying all contempt of the process of the Court, the Court refused the attachment, and ordered a rule on them *to show cause* why one should not issue. On the return of this rule,

* Act of 2d March, 1793.

Oc'r Sessions, 1851

Statement.

Mr. *Williams* read their affidavit as follows: That they "reside in Ravenswood, *more than* 100 miles from Philadelphia; are partners in the banking, bullion and exchange business; transacting a business averaging from eight to ten millions a month, and having in their employ thirteen clerks: that the nature of their business absolutely requires their personal attendance, and the presence of their books, and that the absence of either, for any length of time, might and probably would not only cause great injury and loss to themselves, but greatly jeopard the interests of their correspondents and the persons with whom they deal."

With regard to *the exact distance* of Ravenswood, their residence, from Philadelphia, which they swore was "*more than* 100 *miles*," it appeared that the place is seven miles from the city of New York, and that the distance of New York from Philadelphia, though commonly spoken of as being 100 miles, and assumed by the post-office contracts as 95 miles, does, in fact, not exceed, by one of the two roads usually travelled, 87 miles, and by the other 90 miles from the Court-house in Philadelphia.

The Court's Opinion. November 3d.

Grier, J. The Court must, of course, have regard to the *actual distance* by the usual routes, and not the imaginary rules assumed for the benefit of mail contractors. The residence of the witnesses is accordingly *within* and not *over* one hundred miles from the Court-house in Philadelphia. We might, therefore, compel the attendance of the witnesses, if a sufficient cause were shown for the exercise of such a power.

We do not think it is the absolute right of the

party to compel the personal attendance of witnesses in every civil case, and much less so in cases pending on the equity side of this Court, where their testimony may be taken before a commissioner. Where the witness, who has been subpœnaed, shows no disposition to treat the process of the Court with contempt, the issuing of an attachment is always a matter of discretion with the Court. Where the witness is sick; where a member of his family is dangerously ill; where age or infirmity or any other reason which would render his compulsory absence from home dangerous to his health, or oppressive, the Court will not compel his attendance, but will either postpone the cause, or order the deposition of the witness to be taken.

In the present case there is no physical disability alleged to excuse the attendance of the witness; but under the circumstances in evidence, we think it would be a great hardship, and would probably cause derangement and injury to the business of the witnesses. There is no reason why their testimony could not be as *well* taken in New York as in Philadelphia; before a commissioner *there*, as before a Master *here*. In fact, it is but a question of convenience and expense. Must the witness be dragged from his counting-house to the great injury of his business, and compelled to transport himself and a cart load of books of accounts to Philadelphia for the mileage and daily pay allowed by law? Shall he shut up his bank, suspend his business, merely to save a little expense to the party who wants his evidence? If there was an absolute necessity for such a sacrifice on the part of the witness; if there would be a failure of justice, unless his attendance at *this* place were enforced, the

Oct'r Sessions, 1851.

The Court's Opinion.

Court would be bound to issue this compulsory process. But where, as in the present case, it is but a question of convenience and expense between the *party* and the *witness*, we think that the witness may justly demur to an application, which is to transfer the burthen to his shoulders.

If it should turn out (which we have no right to anticipate) that the witnesses should refuse to make a full, fair and candid disclosure of all facts within their knowledge, and of which the Master may judge proper to inquire, the Court *can* and *will*, on proper proof thereof, compel the attendance of the witnesses, and enforce obedience to their orders. But at present we do not see a necessity for enforcing the attendance of the witnesses at this place, at so great a sacrifice of their private interests.

RULE DISCHARGED.

[OCTOBER SESSIONS, 1851, NO. 1, EQUITY DOCKET.]

CASKIE V. WEBSTER.

[COMITY BETWEEN THE STATES.]

A general voluntary assignment, valid by the laws of one of the United States—though assumed to be void if it had been made in another—will carry property in that other against an attaching creditor there.

The case of *Ingraham* v. *Geyer*, decided A. D. 1816, in the Supreme Court of Massachusetts, in which an opposite doctrine was held, is not law.

OCT'R SESSIONS, 1851.

STATEMENT.

MARTIN, of Virginia, made an assignment, valid by the laws of that State, of all his property to Caskie, of that same State, for the benefit of such of his creditors as should assent to certain terms set forth in it, and which are not allowed by the laws of Pennsylvania. Several creditors, chiefly of Virginia, assented. One item of his property was a debt due by a resident of Pennsylvania; and before Caskie could get the money from this debtor, Webster, *a Pennsylvania creditor, who had refused his assent,* attached it for a debt, which was due to *him.* Assuming such an assignment as Martin made, to be void if it had been made in Pennsylvania—which, however, the Court thought it was not—one question in the case was, whether this debt passed to the general assignee in Virginia, or was held by the attaching creditor in Pennsylvania.

Mr. *Porter*, and Mr. *Webster*, for the Pennsylvania creditor. There is no doubt, that in England the law is as we contend. In *Le Chevalier* v. *Lynch*,* an attaching creditor was protected against the assignees of the bankrupt in England; although the plantation in which the foreign attachment was instituted, was within the same dominion, where the bankrupt

*Douglass, 170

Oc'r Sessions, 1851.

STATEMENT.

law was enacted. But the exact point now before the Court has been decided in this country. *Ingraham* v. *Geyer*,* in the Supreme Court of Massachusetts, is this case with a change of names only;—Massachusetts for Pennsylvania, and Pennsylvania for Virginia. On facts like those before us,—*a voluntary assignment*, Parker, C. J., gives the opinion of the Court: "To give effect to this assignment so as to intercept the lien obtained by a creditor here, under the laws of our own State, when by the effect of that assignment, he would be deprived of all opportunity of participating with the creditors in Pennsylvania in the proceeds of the debtor's effects, would be an undue partiality to foreign creditors, not warranted by the principles of justice, nor required by the comity of nations."

* 13 Massachusetts, 146.

After an argument by Mr. *T. I. Wharton*, and Mr. *Henry Wharton*, on the other side, the opinion of the Court was given by

GRIER, J. A debt is a mere incorporeal right. It has no *situs*, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the law of his domicil, whether such assignment be called legal or equitable, will operate as a transfer of the debt, which should be regarded in all places.

In America, bankrupt or involuntary assignments by operation of law, have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property, valid by the law of the owner's domicil, is valid everywhere. I know there are some cases to be found, in which the Courts of some States

Oct'r Sessions, 1851.

The Court's Opinion.

of this Union have decided that a voluntary assignment for the benefit of creditors, valid by the law of the creditor's domicil, will be disregarded, where it is prejudicial to the interests of attaching creditors in other States, or invalid by the laws of the State, where the debt or property is attached. Such is *Ingraham* v. *Geyer*, cited at the bar. But these decisions are not binding as authority beyond the States, in which they were made, and the counsel have not brought to our notice any case, controlling us, where the doctrine of them has been affirmed. Sitting here as a Court of the United States, we do not think that the different States of this Union are to be regarded as a general thing in the relation of States foreign to each other. Especially ought they not to be so regarded, in regard to questions relating to the commerce of the country; which is coextensive with our whole land, and belongs, not to the States, but to the Union.

[APRIL SESSIONS, 1851, NO. 6, COMMON LAW DOCKET.]

CHARGE TO THE GRAND JURY

ON THE LAW OF TREASON.

Ap'l Sessions, 1851.

Statement.

On the 18th of September, 1850, Congress, in order to give effect to a provision of the Constitution, passed a law to enable the owners of fugitive slaves to recover them when found in the States to which they had fled. Slavery, the abolition of slavery, this law, or any law for the recovery of slaves, had been for some time prior to the passage of the act, the themes of passionate and fanatical debate by extreme factions in the northern and southern States. The country was convulsed by party rage, and that 'unity of government which constitutes us one people,' had itself become endangered. Not content with resisting the passage of the act, the northern part of the faction, immediately after its passage, set themselves to work through the pulpits, the press, through public harangues and secret engines of every kind, to bring about resistance to the law, and to destroy the power of executing it through the force of public opposition.

In this circuit, everywhere, owing to the energy of this Court, and of the commissioners and officers appointed by it to execute the provisions of the act, the law was generally enforced with integrity. "As the Lord liveth, and as my soul liveth,"—declared Mr. Justice Grier, just after its passage, and in the midst of an assemblage whose murmurs of violence were disturbing his administration of justice,—"this Court will administer this law in its full meaning and

Statement.

genuine spirit till the last hour that it remains on the statute book."

In one of the interior counties, however, it was successfully resisted. Mr. Edward Gorsuch, a citizen of Maryland, who had come to Christiana, in Lancaster county, Pennsylvania, to reclaim his slaves, was met by a body of armed men, assaulted, beaten and murdered. His son who was with him, was at the same time, beaten, robbed and stabbed, and his life endangered. An officer of the United States was driven back by menaces and violence while proclaiming his character and exhibiting his warrant. The time and the manner of these outrages, their asserted object, the denunciations by which they were preceded and the concerted action of the persons, evinced, it was thought, a combined purpose forcibly to resist the statute. And it was stated that for some time before this, gatherings of people had been held from time to time at West-Chester, a town near the place of the outbreak, at which denunciations of the law were made as unconstitutional and of no obligation against "the higher law of every man's conscience:" the judges of the United States who would enforce it denounced as Scroggss and Jeffriess, and exhortations made and pledges given to defy its execution to the last.

The murder of Mr. Gorsuch, under such circumstances, caused a deep feeling throughout the whole country: and it being stated to the Court that several bills of indictment for Treason against the United States would be laid before the Grand Jury, that body was thus charged on the law of Treason, by

Kane, J. Treason against the United States is

Ap'l Sessions, 1851.

Charge by Kane, J. September 29, 1851.

defined by the Constitution* to consist in "levying war against them, or in adhering to their enemies, giving them aid and comfort." This definition is borrowed from the ancient law of England;† and its terms must be understood of course in the sense which they bore in that law, and which obtained here when the Constitution was adopted. The expression "levying war," so regarded, embraces not merely that act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the Constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. This in substance has been the interpretation given to these words by the English judges, and it has been uniformly and fully recognised and adopted in the Courts of the United States.‡

*Art. III. sect. 3, cl. 1.

†Stat. 25, Edw. III., stat. 5, chap. 2.

‡ See Foster, Hale and Hawkins, and the opinions of Iredell, Paterson, Chase, Marshall, and Washington, JJ., of the Supreme Court, and of Peters, D. J., in U.S.v.Mitchell, U. S. v. Fries, U. S. v. Vollum and Swartwout, and U.S.v.Burr.

The definition, as you will observe, includes two particulars, both of them indispensable elements of the offence. There must have been a combination or conspiring together to oppose the law by force, and some actual force must have been exerted; or the crime of treason is not consummated.

The highest, or at least the direct proof of the combining may be found in the declared purposes of the individual party before the actual outbreak; or it may be derived from the proceedings of meeting, in which he took part openly, or which he either prompted, or made effective by his countenance or sanction,—commending, counselling or instigating forcible resistance, to the law. I speak, of course, of a conspiring to resist a law, not the more limited purpose to violate it, or to prevent its application and enforcement in a particular case, or against a parti-

cular individual. The combination must be directed against the law itself.

But such a direct proof of this element of the offence is not legally necessary to establish its existence. The concert of purpose may be deduced from the concerted action itself, or it may be inferred from facts concurring at the time, or afterwards, as well as before.

Beside this, there must be some act of violence, as the result or consequence of the combining. But here again, it is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

There has been, I fear, an erroneous impression on this subject among a portion of our people. If it has been thought safe, to counsel and instigate others to acts of forcible oppugnation to the provisions of a statute,—to inflame the minds of the ignorant, by appeals to passion, and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men,—to represent the Constitution of the land as a compact of iniquity, which it were meritorious to violate or subvert,—the mistake has been a grievous one; and they who have fallen into it may rejoice, if their appeals and their counsels have been hitherto with-

Ap'l Sessions, 1851.

Charge by Kane, J.

out effect. The supremacy of the Constitution, in all its provisions, is at the very basis of our existence as a nation. He, whose conscience, or whose theories of political or individual right forbid him to support and maintain it in its integrity, may relieve himself from the duties of citizenship, by divesting himself of its rights. But while he remains within our borders, he is to remember, that successfully to instigate treason, is to commit it.

It is declared in the article of the Constitution which I have already cited, that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court." This and the corresponding language in the act of Congress of the 30th of April, 1790, seems to refer to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the Grand Inquest. There can be no conviction until after arraignment on bill found. The previous action in the case is not a trial, and cannot convict, whatever be the evidence or the number of witnesses. I understand this to have been the opinion entertained by Chief Justice Marshall;* and though it differs from that expressed by Judge Iredell, on the indictment of *Fries*,† I feel authorized to recommend it to you, as within the terms of the Constitution, and involving no injustice to the accused.

*1 Burr's Trial, 196.

† 1 Wharton's American State Trials, 480.

I have only to add, that treason against the United States may be committed by any one resident or sojourning within its territory and under the protection of its laws, whether he be a citizen or alien.‡(A)

‡1 Hale's Pleas of the Crown, 59, 60, 62; 1 Hawkins's do. chap. 2, § 5; Kelynge, 38.

(A) This charge was delivered in the absence of Mr. Justice Grier. On a subsequent occasion, however, he referred to it as containing a correct statement

UNITED STATES V. HANWAY.

[CHALLENGE TO JURORS: EVIDENCE: TREASON AGAINST THE UNITED STATES.]

[COUNSEL FROM STATES WITHOUT THIS CIRCUIT.]

One who being summoned as a juror in a case, where treason was charged to have been committed—stated, on being challenged, that he had read the newspaper accounts of the facts at the time, and come to his own conclusions—*had made up his mind*, that the offence was treason, though he had not expressed that opinion,—nor apparently formed nor expressed an opinion that the defendant was or was not engaged in the offence—is incompetent to sit as a juror. (*Walsh's case.*)

One who has formed a conditional, but not an absolute opinion on the law of treason: e. g., who says he can't understand how treason can be committed against the United States if such and such facts do not constitute it, is competent to sit as a juror, if he says that, on being instructed by the Court, that the opinion is erroneous, such opinion will cease to influence him as a juror. (*Reynolds' case.*)

The prosecution have no right to ask a juror, whether he has *so* made up his mind [on facts?] as that *it could* not be altered in the course of a trial; there being no obligation on the prisoner to take upon him the burden of changing the juror's mind to the extent, that even if this question were answered negatively, he might have to do it, to procure an acquittal. (*Whitman's case.*)

One who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged," is competent. (*Brinton's case.*)

One who had 'certainly expressed an unfavourable opinion towards the course of these gentlemen,'—that is a party of persons with whom the prisoner agreed in opinion; the person summoned being sensible of no such bias as would affect his action as a juror; having neither formed or expressed any opinion as to the guilt or innocence of the prisoner, or of the other persons charged to have participated with him in the offence; not presuming to be a judge whether the offence was treason; knowing none of 'these gentlemen' individually, and meaning to express nothing more than an opinion against the transaction, and that the persons engaged in it ought to be punished, is competent. (*Lyons's case.*)

One who had formed, though not expressed, "some opinion" relative to the matter to be tried—who had made up his mind as to the subject of *treason*, provided the facts were proved, but not as to the guilt of the prisoner, was recommended by the Court to be withdrawn; the trial being one for treason; the definition of which word in application, though not abstractly, had not yet

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of the decisions on the subject, and he expressed his full concurrence in the doctrines and sentiments which it expressed.

been perfectly settled by judicial decision; and the Court considering that his answer indicated that he might have 'made up his mind' on the law of treason; and made it up differently from what the Court would decide.

The Court, in the early empanelling of jurors, where the numbers unchallenged are yet great—or in particular trials, or in particular circumstances,—as where public opinion has been abused by the party-press—or where there is reason to suppose that the opinion of the neighbourhood from which the jurors came, may be biassed—will allow more searching and particular questions to be put to the persons summoned as jurors, than it would afterwards, where it appears that a jury, such as would be entirely desirable, cannot be had; or where the case has not excited public interest. It will seek in the first instance, and as far as practicable, to have a jury not only free from legal bias, but even from any even light impressions about the case at all.

On an indictment for treason, everything tending to show that there was an intention to make public resistance to a law of the United States, is entirely evidence in chief, and cannot be received in rebuttal.

On an indictment for treason, the intent of the act, being essential, it is competent to show, that a long time (say within nine months) before the alleged treasonable occurrence, facts had occurred, and rumours were prevalent in the neighbourhood, which would explain certain particulars relied on, to show treasonable intent, and make them show a different intent.

A person who stands indicted of treason along with the defendant in *another* indictment not now trying, is a competent witness for him in an indictment now trying, and in which such person is not included.

To constitute the offence of treason against the United States, there must be a conspiracy to resist generally and publicly, by force,—and an actual resistance by force or by intimidation, of numbers—of a law of the United States.

A conspiracy to resist by force the execution of such law in particular instances only;—a conspiracy for a personal or private as distinguished from a public and national purpose, is not treason; however great the violence, or force or numbers of the conspirators may be.

In a prosecution in the Circuit for treason, in the alleged commission of which a citizen of a State, without the Circuit, had been assaulted and killed, the Court approves of the presence of special counsel from that State; as well counsel coming here by order of the governor of the State, as counsel employed by the friends of the deceased.

Oc'r Sessions, 1851.

Statement.

HANWAY was indicted for treason against the United States, the punishment for which is death. A number of other persons also stood indicted at this term for the same offence in which he was said to be engaged. The bill charged Hanway with intending to resist, in a treasonable way, the execution of an act of Congress passed September 18th, 1850, and commonly called "The Fugitive Slave Law." As

already stated,* this law, its expediency, its constitutionality, and every thing connected with it, had been the theme of violent party debate. And a resistance to it, with which Hanway and the other persons were charged to have been connected, had also been the subject of general knowledge, of all kinds of representations, and of violent comment and debate: and this particular trial, the counsel, the court, the pleadings, the evidence, the law, had all engaged the columns of the party press, especially in New England. The prisoner being arraigned and the jurors ready to be called, a discussion arose here as to the proper questions to be put. The Court said that they considered it due to the pannel, and due also to the purposes of justice, that as far as possible every juror that was sworn to pass between the United States and the prisoner, should be entirely without bias of any sort whatever. That the offence of which the prisoner was charged, consisted of the two elements of the act, and the intent of that act. And that a juror who had formed an opinion as to the prisoner's participation in a certain act, or as to the intent which would be deducible from that act, had already passed in his mind upon a part of the general proposition involved in a question of guilt or innocence. In that view of the subject, the Court allowed the following questions; precedents, with certain variations in some, being adduced for all of them. They said, however, in subsequent parts of the case, that they did not mean to promulgate and settle all and each of these questions, as the exactly proper and the only ones, to be put in all instances and under all circumstances. They would enlarge or limit their extent in application by construction.

*Ante, p. 134.

Challenges of Jurors.

Oc'n Sessions, 1851.

Statement.

There being many treason trials to come on, they thought it possible, that in the progress of the cases, it might become necessary, in order to have a trial at all, to modify the questions. They took notice of the fact, that there had been an attempt, by portions of the press, to prejudice the public mind and to anticipate the decisions of the Court and jury on the subject of these trials, and stated that to be the reason why questions more searching than usual, were allowed. If it should turn out in the result, that the jurors summoned from the community were preoccupied by newspaper reports, but were yet capable according to their best judgment, of rendering a true verdict according to the law and the evidence, it might become indispensable to reconsider and modify questions settled in an earlier and different state of the case. The questions allowed were these:

Questions to Jurors.

1. Have you any conscientious scruples upon the subject of capital punishment, so that you would not, because you conscientiously could not, render a verdict of guilty, death being the punishment, though the evidence required such a verdict?

2. Have you formed or expressed any opinion relative to the matter now to be tried?

3. Are you sensible of any such prejudice or bias therein, as may affect your action as a juror?

4. Have you formed or expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged against him in the indictment?

5. Have you heard anything of this case which has induced you to make up your mind as to whether the offence charged in the indictment constitutes treason or not?

Oc'r Sessions, 1851.

STATEMENT.

6. Have you formed an opinion that the law of the United States, known as the Fugitive Slave Law of 1850, is unconstitutional, so that you cannot for that reason, convict a person indicted for a forcible resistance thereto, if the facts alleged in the indictment are proved, and the Court hold the statute to be constitutional?

Walsh's Case.

Walsh in reply to the 2nd and 3rd questions—whether he was sensible of any such prejudice or bias, as would affect his action as a juror; and whether he had formed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged? answered, that he had read the newspaper accounts at the time, and '*came to his own conclusions.*' He was challenged by the prisoner for cause.

Challenge of Jurors.

Counsel of The United States: The cause is insufficient. If every juror who has come to a conclusion in his own mind, upon statements made in the newspapers, is to be excluded, we shall be scarcely able to obtain an impartial panel. Almost every intelligent man has read an account of this proceeding, given by the newspapers, and has undoubtedly formed some conclusion in his own mind. The human mind is so constituted, that facts can scarcely be brought to bear upon it that it does not conclude either *pro* or *con*, in regard to it. It is not enough that he should have read an account, and come to a conclusion upon it in his own mind. He must have expressed that conclusion. There is a difference between the formation and expression of an opinion. If the juror has formed an opinion, without having

O. T. Sessions, 1851.

Statement.

expressed it, he is not committed as far as language is concerned. He is not so far committed in one case as in the other. That pride and prejudice, which we all possess, is enlisted in requiring that an opinion expressed should be maintained and proved true. In the case of *Callender*, before Judge Chase, a similar question was proposed to Mr. Basset.* The indictment charged the publication of a certain book, being a malicious libel. Mr. Basset "had never seen the book, though he had extracts in the newspapers, and he had formed and expressed an unequivocal opinion, that if the extracts were correctly taken, and Callender was the author or publisher of that book, the book was a seditious act; but he had never formed and expressed an opinion in respect to the indictment; for he had neither seen nor heard it."† He was admitted; and though this was found fault with, and made one of the charges against Judge Chase, on his trial, he was acquitted of impropriety—there being no dispute about facts—by a majority of 24 to 10. The ruling was referred to, apparently with approbation, by C. J. Marshall,‡ who explains Mr. Bassett's account by saying, that Mr. Bassett had declared the book to be a libel, but had not expressed an opinion who was the author.

* See Mr. Basset's own account, Chase's Trial, vol. 1, p. 200.

† Id. 6; id. vol. 2, p. 487.

‡ Burr's Trial, vol. 1, p. 370.

Grier, J. Before the Court can exclude Mr. Walsh for cause, we wish to know if he has formed a conclusive opinion, that the transaction for which this defendant is upon trial, or his participation in it, was treasonable against the United States government. If he has, then he has formed an opinion which affects a most important matter in this case, which is, the intention of the defendant: or if he

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STATEMENT.

Challenge of Jurors.

has formed an opinion that this defendant is or is not one of the persons who was guilty upon that occasion, and expressed it, that is important. But, standing merely by itself, his reply might be made by every juror, and we might not get a panel for two years.

GRIER, J. Have you formed a conclusive opinion as to whether the persons engaged in this transaction are indictable for treason?

Juror. I think the offence treason.

GRIER, J. You have made up your mind, I understand you. Have you ever expressed the opinion?

Juror. I do not remember that I have expressed it.

GRIER, J. Did you, at that time, form the conclusion in your mind, that the offence was treason?

Juror. I did, Sir.

GRIER, J. That is sufficient.

Walsh set aside.

Set aside by the Court.

Reynolds's Case.

Reynolds in reply to the 4th question, whether he had formed or expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged, answered: I cannot say that I have formed an *absolute* opinion about it; I may have *conditionally*. It is in my mind a matter of doubt. I say that if it is not a treason, I don't see how treason against the United States can be committed; for as to '*levying war*'—in the ordinary sense of the word war—against the United States, things could not go to that extent. A large army would not be allowed

Oc'r Sessions, 1851.

STATEMENT.

to assemble. The opposition would be put down before it presented such an aspect. I have also expressed an opinion that the white persons, if there were any engaged in it, were more culpable than the absconding slaves, who were led on by them." Challenged by the prisoner for cause.

Counsel for the United States. There is no difficulty here. The Juror is asked if he has formed an opinion as to whether this is treason or not; and his answer is, "I do not know whether it was or not." He has not made up his mind upon the subject. "But if this was not treason, I do not know what constitutes treason." The point is, has he so armed his mind, that he is not disposed to take the law from the Court, as presented by it? Will he act upon his own judgment, in opposition to it? And the question should be put, "Have you so formed an opinion, that if the Court instructs you to the contrary, you will still hold it?" The opinion may be so light as to be easily removed.

Counsel for the prisoner. The intention of the Court is, to get men that stand untainted by rumours. Mr. Reynolds asserts in effect, that he has made up his mind that it is treason; for he says he has formed an opinion, that if there can practically be treason against the United States, this is it. He has formed an opinion, that it is treason, if treason can be committed without levying war in the *ordinary* sense of the word. If, therefore, the Court instructs him that it can, a conviction follows as of course. All the facts are *pre-judged.* He has also gone a step further, and shows a bias and prejudice against the prisoner.

Challenge of Jurors.

He says he has expressed an opinion, that the white men, if any were engaged in the affair, as this prisoner, a white man, is charged to have been, were *more* guilty than the blacks whom they instigated. Therefore, the question naturally arises, whether that very expression is not a bias or prejudice against the prisoner on trial. Upon the two opinions given, we are entitled to a challenge.

Reynolds's Case.

Grier, J. The juror is not disqualified by having formed opinions upon the law, if they are not of such a character as to influence his action, in case the Court shall instruct him that they are erroneous: But if his action as a juror would be affected by those opinions in any degree, notwithstanding such instructions; it is good cause of challenge.

Allowed by the Court.

Reynolds challenged peremptorily.

Whitman's Case.

Whitman, in reply to the first four questions, had no conscientious scruples upon the subject of capital punishment, nor had he formed or expressed any opinion relative to the matter to be tried, nor was he sensible of any bias, which would affect his action as a juror, nor had he formed or expressed any opinion as to the guilt of the accused, or of the other persons alleged to have participated with him in the offence charged; but on the fifth question being put, Whether he had heard anything which induced him to make up his mind whether the offence charged in the indictment constitutes treason"—said: "I have formed some opinion about that. I take this case to be pretty nearly similar to Fries's, which happened in the town from which I come." He was challenged for cause.

Oc'r Sessions, 1851.

STATEMENTS.

Challenge of Jurors.

Counsel of the United States. The cause is insufficient; it having been decided in this circuit, that a juror who sat in a case where the defendant was charged with an offence, could sit and decide in another case where the defendant was charged with the same offence. The party having already answered that he is not sensible of any prejudice, which would affect his action as a *juror*, showed that his present answer was to be taken with a qualification, which made his conclusion harmless.

Counsel for the Prisoner. The juror thinks the case like that of a particular individual, who was accused, tried and convicted of treason. In deciding that, he has passed upon the question of intention, which is a question to be submitted to the jury. The next question might be, "What do you mean by treason?" which we might find hard to answer; but here the juror has given the case of a man accused, tried, and convicted, and pardoned for treason; there can be no difficulty about the intention.

GRIER, J. The witness has not given a direct answer, and you may ask an explanation of it.

Counsel of the United States. Have you so made up your mind as to the character of the crime, that it could not be altered in the course of the trial?

GRIER, J. That is not a proper question. The prisoner must not have the burden of changing the juror's mind. This 5th question would not be a good one, except on the ground that in a public transaction of this character—the intention of each and all of the parties concerned, is one of the matters

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which go to make up treason. If the juror had fully made up his mind that this was not treason, it would be an opinion upon a portion of the case, to wit, the intention of the parties concerned, which would make him unfit to be a juror in the case.

The Court.

It being eminently desirable that if it be possible, jurors in all these cases should be without any bias on one side or the other, we think—not meaning by this to lay down an absolute rule for the future, that perhaps the counsel of the United States had better allow Mr. Whitman to go.

Whitman set aside for the present.

Brinton's Case.

Brinton had no conscientious scruples; but in reply to the question, whether he had formed or expressed any opinion relative to the matter now to be tried—answered that he had formed an opinion, "that the laws were outraged in this Christiana case." Challenged for cause.

Allowed by the Court.

GRIER, J. That is no reason for excluding the juror; I suppose every man in the community has formed the same opinion.

Brinton challenged peremptorily.

Lyons's Case.

Lyons, in reply to the question, whether he had formed or expressed any opinion relative to the matter to be tried, had 'certainly expressed an unfavourable opinion towards the course of these gentlemen:' but in reply to the other questions was sensible of no such prejudice or bias in the matter as would affect his action as a juror; had neither formed nor expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have

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participated with him in the offence charged against him in the indictment: and did not 'presume to be a judge,' whether or not the offence charged in the indictment was treason. He knew none of 'these gentlemen' individually; had seen the names of some of them published, and likely had seen the prisoner's name among them, but did not know him.

Grier, J. Did you mean to express anything more than an opinion against the transaction, and that the persons engaged in it ought to be punished?

Juror. No, sir.

The Court.

Grier, J. We do not consider that, taken with his answer to the other questions, is sufficient to exclude him. If a man has been informed that a burglary or arson has committed, and has said the fellow who did that ought to be sent to the penitentiary—would that make him incapable of being a juror? If the juror had expressed an unfavourable opinion as *to this defendant*, it would be different; but his opinion having been only a general opinion as to this transaction, does not incapacitate him.

Allowed by the Court.

Challenged peremptorily.

Smith's Case.

Smith had formed 'some opinion' relative to the matter to be tried; but had not expressed it. He had 'made up his mind as to the subject of treason, provided the facts were proved, but not as to the guilt of the prisoner.'

Challenged by the prisoner for cause.

Counsel for the prisoner. The witness has *made up his* mind about the law of treason. He assumes

the office of the Court: and whether his law is right or wrong, if certain facts which come up to his notion of what makes treason, he will find the prisoner guilty. In the case of Walsh (ante, p. 143) who was set aside, the juror's expression was, that he had 'made up his mind.' The Court will not ask a juror, whether, his mind being '*made up*,' it will be altered by a charge from the Court. That is a matter of mere speculation, and which no man can safely undertake to answer. All presumption is, that it will not be.

In Burr's case,* Roberts was set aside, because "he had thought and declared from the reports in the public newspapers, that the prisoner was guilty of treason, though he had *no doubt* that his opinion might be changed by the production of other testimony." If this man goes into the jury box, we have to labour to get an impression out of his mind. He is not *ab omni exceptione major*. "A juryman," says C. J. Marshall,† "should come to a trial of a man for life, with a *perfect freedom* from previous *impressions*."

* Burr's Trial, vol. 1, p. 375.

† Id. p. 369.

Counsel of the United States. The Court has already said, in the case of Reynolds,‡ that a person is not disqualified from sitting, though he has formed an opinion of the law, if, when instructed that the opinion is wrong, it will not influence his action as a juror. This man has formed an opinion, *if* the facts stated in the papers are true, that those facts constitute treason, but he has not connected the prisoner in any way with the facts. That distinguishes the case from Roberts's, cited from Burr's trial. The juror here has formed no opinion condi-

‡ Ante, p. 147.

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tional or otherwise as to the guilt or innocence of the prisoner, nor any opinion as to the truth of the facts stated in the newspapers. His opinion is abstract merely. Certain facts he believes constitute treason. So does every man of sense. But a man's intelligence is not to be cause for challenge.

The Court.

Grier, J. I think that if this were an ordinary case, as an indictment for burglary, the conclusions of the juror would hardly be sufficient to exclude him. It is very natural if your neighbour's house has been broken open and robbed at night, that you should come to the conclusion that a burglary had been committed: and such belief ought not to prevent a person being sworn in a panel, to try a man accused of the offence. There is no dispute there as to what is a burglary in the meaning of the law. I do, however, see some difference in this case. The whole country has been agitated by questions as to what in application legal is "treason." The defence will perhaps contend, that admitting every fact asserted, there is no treason. Its *applied* definition of treason may be wholly different from that of the prosecution, while both of course adopt in the abstract the definition in the Constitution. It is to the honour of our country, that the crime has never been so defined by judicial application of it to cases, as to settle its meaning in the same way as the meaning of other offences; burglary, for example, is settled. Now this witness would rather seem to have made up his mind upon the subject. He has settled for himself the meaning, in application, of the constitutional definition. This being a point, which will probably form a great subject of argument, and the matter not being absolutely

res judicata, we think it best that this person should withdraw. Oc'r Sessions, 1851. STATEMENT.

CHALLENGE SUSTAINED.

The Principal Case. Principal Case.

A jury being impanelled, the facts of the prosecutor's case as they appeared from its own evidence, were essentially these.

On the 9th of September, 1851, Mr. Gorsuch, of Maryland, having procured from a Commissioner of the United States, authorized to issue them, certain warrants to arrest some fugitive slaves of his, went with Kline, an officer appointed by the Commissioner, to Christiana, in Lancaster county, Pennsylvania, to take them. The place was inhabited by people who, in general, were strongly opposed to the Fugitive Slave Law; many of them being violent and fanatical on this subject. Mr. Gorsuch's son, nephew and some relatives, went with the officer. The fact that the writs had issued, became known to Williams, a negro in Philadelphia, who preceded Kline and his party to the neighbourhood of Parker's house, where the slaves were lurking, and gave notice that the arrests were to be made, leaving with another person the names of some of Mr. Gorsuch's slaves, on a piece of paper. On the 11th, the officer and the others went over to Parker's, which they reached about daylight.

While proceeding along the road, their attention was arrested by the sound of horns and the blowing of a bugle. After watching about Parker's house for a short time, one or two negroes were seen coming out of it. On discovering Kline and his party, they

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fled back into the house, and on pursuit being made by him, ran up stairs. These negroes were recognized by Mr. Gorsuch as his slaves. Kline entered the house, and almost immediately ascertained that a large number of negroes were concealed in the upper part of it; he nevertheless went to the stairway and called the keeper of the house to come down, stating that he was desirous of speaking to him.

The negroes at this time were heard loading their guns. Kline, hearing the noise, said to them that there was no occasion for arming themselves,—that he designed to hurt no one, but meant to arrest two men who were in the house, and for whom he had warrants. Some one replied they would not come down. Mr. Gorsuch then went to the stairway, called his slaves by name, and stated that if they would come down and return home, he would treat them kindly, and forgive the past. Kline then read the warrants three times, and afterwards attempted to go up stairs, when a sharp-pointed instrument was thrust at him, and an axe afterwards thrown down, which struck two of the party below. Mr. Gorsuch then went to the front door of the house, and looking up to the window, again called to his slaves by name, when a shot was fired at him from the window. To show that his party was armed, Kline fired his pistol. At this period a horn was blown in the house, which was answered by other horns from the outside, as if by preconcerted action. The negroes then asked fifteen minutes time for consideration, which was granted to them. At this moment a white man was seen approaching the house on horseback. It turned out to be Hanway. Kline walked towards

him, and inquired if he resided in the neighbourhood. According to the testimony of this Kline, who was not a person of the best character for veracity, his answer was short and rude—"It is none of your business." Kline replied, by letting him know he was a deputy marshal of the United States, gave him the warrants to read, and called upon him, in the name of the United States, to assist in making the arrests. Hanway replied "he would not assist—that he did not care for that act of Congress or any other act,—that the negroes had rights and could defend themselves, and that he need not come there to make arrests, for he could not do it." By this time another white man had arrived on the ground, (Lewis,) who walked up to Kline, and asked him for his authority to be there. Kline showed his papers to him also. Lewis then read the warrants, passed them to Hanway, who returned them to the marshal. Lewis, after reading the warrants, said, "the negroes had a right to defend themselves." Kline then called upon him to assist him in making the arrests, when he refused, and would not even tell his name. Kline then asked Hanway where his residence was? he replied, "You must find that out the best way you can." Kline then explained to them what his views of the act of Congress of September 18th, 1850, were, and informed them that through their agency these slaves would escape. By this time the blacks had gathered in very large numbers around the house, armed with guns, which they commenced pointing towards the marshal. At this juncture, Kline implored Hanway and Lewis to keep the negroes from firing, and he would withdraw his men, leave the ground, and let the negroes go. Hanway instantly replied, "They

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had a right to defend themselves, and he would not interfere." Kline's answer was, "they were not good citizens, or they never would permit the laws to be set at defiance in this way." One of Mr. Gorsuch's family then remarked, "that all they wanted was their property, and that they did not wish to hurt a hair of any one's head." Lewis replied, "that negroes were not property;" and then walked away. By this time another gang of negroes had arrived, armed with guns and clubs, and Hanway rode up to them and said something which was not heard. He moved his horse out of the way of the guns; the negroes shouted, and immediately fired from every direction. Hanway rode a short distance down the lane leading from Parker's house, and sat on his horse watching the blacks. Kline then called to Lewis, telling him a man was shot, and begging him to come and assist, which Lewis refused to do. The number of negroes assembled at this time was between fifty and a hundred. Before the firing commenced, Mr. Gorsuch was struck with a club on the back part of the head, and fell forward on his hands and knees. As he was struggling to rise, and in the act of getting upon his feet, he was shot down amid frantic yells and howlings; and when prostrate on the ground, was cut on the head with a corn cutter, and beaten with clubs. His son on perceiving the attack made upon his father, immediately rushed to his assistance, when his revolver was knocked out of his hand, and he himself shot in various parts of the body, rendering him utterly helpless. A nephew was attacked at the same time, and defended himself with his revolver, which he twice snapped at his assailants, but the powder being wet it would not go off. He was also struck down,

beaten and maltreated. When the firing commenced, Kline, in order to avoid its effects, escaped into a corn-field, but on seeing Mr. Gorsuch's son struggling, apparently wounded and bleeding, went to his assistance, and placed him under the shelter of a tree until aid could be procured. Two of the others of Kline's party were at the time making their escape. The negroes overtook one of them, knocked him down with a gun, beat and bruised him. The other escaped into a farm house, where he was concealed. A number of shots were fired at others, as they moved off. One was shot in the wrist, side and shoulder, and a ball also passed through his hat just above his forehead. In the effort to escape, these last rushed towards Hanway, who was on his horse which was yet standing still. They besought him to prevent the negroes from pursuing farther. He said he could not. They then asked for permission to get upon his horse, which would afford the means of making their escape. He refused their request, and putting whip to his horse rode off at full speed. Several of the United States party were subsequently carried to houses in the vicinity, and were a long time recovering from their wounds. Mr. Gorsuch was killed. In connexion with these facts it appeared from Kline's testimony,

1st—That so soon as Hanway appeared at the bars, the negroes in Parker's house appeared to be encouraged, and gave a shout of satisfaction, when before that they had appeared discouraged, and had asked for time.

2nd—That before the firing commenced, Kline had given orders to his party to retreat, and they

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were actually engaged in the retreat when the attack was made.

3rd—That Mr. Gorsuch, who was killed, had no weapon of any kind in his hands.

Such was the case of the United States giving credit to all its testimony. No essential fact in it was disproved or indeed denied.

The defence showed, however, that Hanway was a native of one slave State, had resided long in another, had been a resident of a part of the country far distant from Pennsylvania, and had been living in the neighbourhood of Christiana for only three years past, and while there was evidence that "Anti-slavery Conventions" had been held at West Chester, a place near Hanway's residence, where the Fugitive Slave law was denounced as unconstitutional, wicked and of no force against 'the higher law of every man's own conscience,' and denunciations made against every judge, who would enforce it, as governed by the spirit of Jeffries and Scroggs; there was no evidence that Hanway attended these meetings. As to the events of the morning of the 11th of September, the defence showed that about sunrise of that day, Lewis, already mentioned, was informed by a person, who was called at his house, that there were "kidnappers at Parker's house." And starting at once for this place, as he passed, gave the information to Hanway, who was just getting up. Hanway, in his shirt sleeves, mounted his horse, rode over, and at the place met Lewis, who had taken a nearer route across the fields. As they arrived Kline met them, and stating that he was marshal, required their aid. Lewis asked to see his authority, and Kline produced the writs. Meanwhile the blacks were

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rapidly gathering, and Hanway, pointing out the fact, warned the marshal of the danger of attempting, under such circumstances, an arrest, and advised him to retire. At the same time, and before any firing, they retired. And passing out of the road, Lewis followed by Kline, turned in one way, while Hanway rode off in another.

In regard to this matter of 'kidnappers,' it was not easy to gather the exact facts of the case. It was certain that in September, 1850, and in March, 1851, men of bad character not having, or at least not professing to have any warrant of law, had in a rough way come to Christiana, and carried away at night, out of the houses where they were, two negroes, then residing there, who never again returned. But whether these negroes were runaway slaves, now taken home by men, who expected to be paid by the owners, or to get a reward publicly offered; or whether they were free persons of colour, stolen by 'kidnappers' in the legal sense of the word, was not proved. The term was perhaps a slang one; it being one which had been frequently applied with others, as bad, to persons who came from the south, to recover their runaway slaves. It appeared, however, that the events excited some alarm in the place, which had many persons in it opposed to the Fugitive Slave law, and that there was some feeling of insecurity professed among the people of that neighbourhood.

Points of Evidence.

Points of Evidence.

Such was the case as presented by the evidence given before the jury. A good deal of it was received after objection only, and hence upon this, as also

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Points of Evidence.

upon evidence excluded there arose in the case several incidental points. For example, that relating to "kidnappers." In introducing this evidence, the counsel of the defence did it by asking a witness to state any fact he knew with regard to the kidnapping and carrying away coloured people in the neighbourhood of Parker's house, within a period of about nine months prior to the events of the 11th of September: but the object of the testimony being stated to be to show that there was great alarm in the region, about kidnappers and that Hanway came to see if these men were kidnappers or not.

Counsel of the United States. This testimony is irrelevant to the issue, and if it were introduced, would have a pernicious effect upon the execution of all law. We have charged that the defendant sought to resist the laws of the United States, and so far as the testimony is before this Court, have shown that warrants were issued on the 9th; that notice in opposition to them was given immediately by Williams; that resistance took place on the 11th; that Hanway was on the spot, as by preconcert, saw the United States process in the hands of its officer and countenanced and encouraged the acts which took place. They purpose to show that nine months anterior to this 11th of September, there were parties who actually kidnapped. Can it be given in evidence that certain parties did nine months before commit an unlawful act? There is no crime in the world that could not be justified in the same way, and by showing that somebody had done a wrong anterior to it. If they can go back nine months, they can go back eighteen months. If they can show something

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1st Point of Evidence.

within even two weeks, it will be admitted by us; but, to permit them to show that some other parties, not purporting to have any connection with this affair at all, committed a certain outrage nine months anterior to the time this transaction took place, is opening too wide a door on their side.

Counsel for the Prisoner. The crime of treason consists in acts done, and the intention with which they were done. Many acts may be done which, if done with an intention to levy war against the United States, would be treason; but these same acts done without any such previous intention, would amount to an ordinary breach of the peace, or to misdemeanor and murder. The question for the jury is, what brought together these people, some armed and some unarmed. For if they have come together with a lawful intent, and afterwards, even they who came with such intent, committed murder, it is not treason. How then are you to show what brought these people together? The prosecution have given some slight testimony, such as the sounding of a horn about breakfast time, from which they will ask the jury to infer that there was a previous combination to resist the United States government. Now, what we propose to show is this: That there were residing in that immediate neighbourhood a gang of professional kidnappers: that they had not only upon one, but on two or three occasions, in the dead of the night, invaded the houses of the neighbours, (of white people, where black men lived, and black people,) and by force and violence and great injury and malice, without authority whatsoever, seized and carried these men away; and that they

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have never afterwards been seen or known of in those parts. And that in consequence of this, there was a general feeling of indignation, not against lawful authority, but against outlaws who thus prowled over and disturbed this neighbourhood. And that when the prisoner in the morning (for the first time) came out of his own house, not having heard any thing of this, he was informed that there were kidnappers trying to kidnap Parker, whom it was supposed was the object of the attack. And that in pursuance of such information, and with a full knowledge of the repeated acts of outrage and kidnapping in that neighbourhood, he went to the place where he did go. We do this to show what might have brought him there, which is one essential part of the case. And we do it, that if any body should suspect that 'kidnapper' was a covert term or a slang phrase, and that kidnappers did not mean kidnappers, to show that it did mean those who followed that business for a living.

Grier, J. The objection of the prosecution would be irresistible if Hanway was indicted simply for resisting an officer of government. But in treason there must be some previous agreement. The prosecution will probably infer from certain premises a certain intent. They have given evidence that a negro went down on the 9th or 10th and said that kidnappers were abroad, or left certain hierogliphics, or what you please; and applying this as a slang term to a master seeking his slaves, may argue conspiracy in a whole neighbourhood. But Hanway might not have understood it so; and though masters were there with proper process to arrest a runaway,

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Statement.

1st Point of Evidence.

I think it will be proper for the defendant to show, that kidnappers, in a proper sense of the word, had been about, and that there was a degree of insecurity among the free negroes who resided in that neighbourhood. Suppose the sheriff came to my door, and I fired at him out of my window and killed him; under such circumstances you might infer I did it with the intention to murder an officer of the law. But suppose I could show, that a few nights, or even months, ago, a person had broken into my house, and committed a robbery, would you not infer from the fact, that my mind was bent upon something else, and far from any intention to murder the sheriff? Or take the analogous case of a person accused of murder, and upon the question of an intent, it is in proof, that he went to the place where the alleged murder was committed, bearing deadly weapons, it would certainly be permitted him to show that there was a general sentiment of personal insecurity in the community, which justified him in carrying arms, and that that was the reason why he had arms. The question is not perhaps in the strictest form. You might ask more correctly, perhaps, if such rumours or fears were not prevalent. But this, in essence, is not important, and the inquiry may just as well be made as to the facts on which the belief was founded.

QUESTION ALLOWED.

2d Point of Evidence.

Second Point of Evidence.

In support of the defence, the prisoner's counsel called Lewis, the person who had informed Hanway of there being kidnappers at Parker's house. Lewis was not included in the *present* indictment with Han-

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2d Point of Evidence.

way, but was included in another indictment which had been found, and in which Hanway, Lewis and one Scarlet were indicted together for treason; and in another also in which these same, with several negroes were indicted in the same way. The objection now made to Lewis's testimony was that he was interested in this indictment as an instrument of evidence; that if Hanway were acquitted on this indictment he could not be tried again, and that this acquittal would enure to Lewis's benefit on the other indictments in which he stood charged jointly with Hanway. There had been no verdicts. A party was brought into Court to testify for a defendant who is indicted with him. If he can do this for Lewis, he can for others. Suppose indictments in which Lewis is not included against all of the other parties. Is Lewis a competent witness to give testimony *ad seriatim* and thus to acquit all the others and so finally himself; for if every one else is acquitted he cannot be guilty. Treason cannot be committed, we assume, by a single person.

GRIER, J. No good precedent could be found, I think, where by sending up a bill of indictment against him, a witness, otherwise competent, had been cut out entirely from giving evidence. If thirty or forty are indicted I see no reason why one may not be found guilty and the others acquitted. Or why if one has been tried and acquitted, the verdict in his favour would affect the others.

KANE, J. Supposing there were many indicted for treason, and on their trial together, and no evidence given against one of the defendants, could not

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the Court direct a verdict of acquittal, in order to make him an evidence for the defence? which presupposes there is no disqualification of evidence.

Even in the common law there is a distinction between conspiracy and treason. The difference was this: that conspiracy was an offence essentially joint, and there must be a joinder in the indictment, and a conviction of more than one to make it. Treason may be committed severally as well as jointly, and one may be indicted.

WITNESS ALLOWED.

3d Point of Evidence.

Third Point of Evidence.

The defendant having closed his case as already reported, the United States offered testimony to prove that in September, 1850, to wit, a year before this outrage, the county of Lancaster, and particularly the neighbourhood of Christiana, was patrolled by armed bodies of negroes, who went from house to house in that neighbourhood, searching for certain owners of slaves who, it was reported, were thereabouts, attempting to recover their runaway slaves; the said bodies of negroes swearing vengeance and death against such slave owners. The purpose of such testimony was stated to be, to prove that for a long time there had been a regular organization, for the purpose of resisting in that neighbourhood upon every and all occasions, laws of the United States. No notice of the names or residence of the witnesses, by whom this was to be proved, had been given to the prisoner.

The act of Congress,* on the subject of treason, says, "that any person who shall be accused and in-

* Act of 30th April, 1790, § 29.

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dicted of treason, shall have a copy of the indictments, and a list of the jury and *witnesses* to be produced on the trial, for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors delivered unto him *at least three entire days before he shall be tried for the same.*"

Argument.

This testimony offered as above stated, was objected to by the *counsel for the prisoner*, who contended that in the nature of an indictment for treason, it was testimony in chief and not rebutting testimony. Previous combination is of the essence of treason. The prosecution has given evidence of such combination; (of what value, indeed, we will consider hereafter.) Now our case shows that we have not sought to prove anything to the contrary of what they thus showed or attempted to show. We have confined our case to that which showed the intentions of Hanway alone; though showing incidentally, perhaps, at the same time what induced other individuals to assemble on the morning of the 11th. We have kept our evidence within certain limits, and shown our case in a particular way. We may contend, it is true, and as a defence on the outworks, that the prosecution has not shown treason at all; but our real and our individual position is on more confined ground; and we shall contend that whether *other* persons did or did not commit treason, is unimportant, since Hanway was neither of their number nor counsel. Now the evidence offered is not in rebuttal of anything confined to the exculpation of the particular individual. Our objection is substantial. It is unfair to bring the principal part of the case upon the rear of a defence full and complete to all that has

been presented as requiring an answer. The case that ought to be heard by the jury first, would be thus made to be heard last, and operates with the effect of the most recent impression. If there were no legal and substantial objections, the act of Congress obliges the prosecutor to furnish to the prisoner the names of his accusing witnesses in chief, three days before his trial. Its provisions cannot be defeated by this mere shift of position.

Counsel for the United States. The evidence on the part of the prosecution closed, relying upon the *prima facie* case which was made out; st. the evidence of concert throughout the neighbourhood; that notice has been sent to Christiana from Philadelphia, by Williams, who accompanied some of the officers employed by Mr. Gorsuch; that the names of Mr. Gorsuch's slaves were left on a piece of paper in the neighbourhood of Christiana; that armed men, some on foot, some on horseback, were instantaneously assembled by a concerted signal; and that Hanway was there, and came there, to all appearances like the others. This was *prima facie* evidence of treason, and enough to connect the prisoner with it. The counsel of the defence had an opportunity of saying it was not treason, and that there was a total failure of evidence necessary to establish that crime. But they go on to make a defence: and what is that defence? Why, confessing the fact that there was organization; that horns did sound to summon armed bands to the rescue; they have referred the origin of that organization to lawful motives—the exercise of a fair and natural right—their own protection. They have gone on, therefore, to explain the motive of this

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Argument.

organization, and to say it was not for the purpose of resisting the law, in the reclamation of slaves, but to prevent illegal violence to those who are free. Are we not to rebut that allegation? And if in rebutting it, we introduce evidence which *might* have been admissible in chief, if notice had been given, is it to be excluded? The only inquiry in regard to this rebutting proof is, whether it is strictly rebutting? Does it not, then, destroy the allegation of *motive* on which the defence rely? We offer it only to rebut that; and, *so limiting it*, we are entitled to it as rebutting evidence.

The Court.

Grier, J. There is a great difference between rebutting evidence and evidence by way of set-off.

The statute gives a man accused of treason, (an offence involving terrible consequences,) a particular protection about testimony; but if testimony such as this could be brought in by way of rebuttal, the provision of the statute, (not more humane than just), would in effect be evaded. You cannot evade it by changing the order of proof. On general grounds, also, everything tending to show that there was an intention to make public resistance to a particular law, was evidence entirely in chief, and not at all rebutting anything. It should have been given in evidence in chief: and to draw an illustration from the game of whist, if you gave it now, you would be *reneging* and keeping your trump back to the last trick.

I do not know, indeed, but that the testimony offered might prove directly the contrary of that which it is designed to prove, and only show that there was a band of runaway negroes consociated

to help each other to resist their master, who came to reclaim them. And this would not be such public resistance to the law as to be called treason.

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The Court. 3d Point of Evidence.

KANE, J. I concur with Judge Grier entirely. The two elements of the crime are the act and the preconcert. It is for the prosecution to make out both, and by omitting evidence of preconcert, they fail in their original case. The evidence which is now offered is merely to prove that preconcert. It was an indispensable element of the original case. It seems to me, therefore, that it cannot be introduced as rebutting evidence. It is one of the matters going to prove the charge laid in the indictment, in regard to which the act of Congress is express, that it shall only be proved by those witnesses of whom three days' notice has been given to the other side.

The Principal Case Resumed.

The bill of indictment charged that the prisoner, Hanway, wickedly intending and devising the peace and tranquillity of the United States to disturb, and prevent the execution of the laws thereof, to wit, "An Act, &c.," and another act, supplementary to the same, passed on the 18th September, 1850, did on the 11th of September, 1851, wickedly and traitorously intend to levy war against the United States.

Indictment.

It then sets forth five several overt acts:—

1st. That with a large number of persons armed and arrayed with warlike weapons, with purpose to oppose and prevent, by means of intimidation and violence, the execution of the said laws, he did wickedly and traitorously levy war against the United States.

1st Act.

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Indictment.

2d Act. 2d. That in pursuance of said purpose, the prisoner and others so armed and traitorously assembled to prevent the execution of said laws, did with force and arms traitorously resist Kline, an officer of the United States, duly appointed, from executing lawful process, and wickedly and traitorously did prevent by force and intimidation, the execution of the said laws.

3d Act. 3d. The third was the same as the second, with this addition, that they assaulted Kline, and liberated from his custody persons arrested by him, who owed service and labour to Edward Gorsuch under the laws of Maryland, thereby traitorously preventing the execution of said laws.

4th Act. 4th. That the prisoner, with the others, did traitorously meet, conspire, and consult to oppose, resist and prevent by force the execution of said laws.

5th Act. 5th. That in pursuance of said traitorous intention, he prepared divers books, letters, resolutions, addresses, &c., which he caused to be dispersed, containing incitements and encouragements to fugitives and others to resist, oppose and prevent by violence and intimidation the execution of said laws.

Counsel. *J. W. Ashmead*, D. A. U. S., *G. L. Ashmead*, and *J. R. Ludlow* represented the United States: *R. J. Brent*, Attorney-General of Maryland, *James Cooper*, a Senator of the United States for Pennsylvania, and *R. M. Lee*, of Philadelphia, appeared as special counsel; Mr. *Brent* by order of the Governor of Maryland of which State Mr. Gorsuch was a citizen; Mr. *Cooper* and *Lee* as private counsel of Mr. Gorsuch's relatives: For the prisoner, *J. J. Lewis*, of West-Chester, *T. Stevens*, of Lancaster, *J. M. Read*, *T. Cuyler* and *W. A. Jackson*, of Philadelphia.

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For the United States. Levying war against the United States, is a phrase, the meaning of which is settled, both in England and the United States. The Statute of 25th Edward III., chap. 2, contains seven descriptions of treason, and two of them are thus stated by Blackstone.*

For the United States.

1st. If a man do levy war at our lord the king in his realm.

2d. If a man adhere unto the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere.

* Commentaries, Book iv. ch. 6, §§ 3 & 4.

These are the two kinds of treason, which are defined in the Constitution of the United States, and the words used to describe them are borrowed from the English statute, and had a well known legal signification at the time they were used by the framers of our Constitution. This is stated by Chief Justice Marshall,† his language being that "It is reasonable to suppose the term *levying war* is used in that instrument in the same sense in which it is understood in the English law to have been used in the Statute of 25 Edward III." He then adds, "that principles laid down by such writers as Coke, Foster and Blackstone, are not lightly to be rejected." He then defines‡ in what levying war consists; viz. "That where a body of men are assembled for the purpose of making war against the government, and are in a condition to make war, the assemblage is an act of levying war." There is no dispute that English writers maintain the doctrine that any resistance to an act of Parliament by combination and force, to render it inoperative and ineffective, is treason by levying war. We need not however go into a consideration of the English law of treason, or of what in

† 2 Burr's Trial, 402.

‡ Id. p. 408.

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For the United States.

England, is "a levying of war." The matter is settled by our own decisions. In the cases of the *Western Insurgents*, in 1795,* Judge Patterson says, "If the object of the insurrection was to suppress the Excise office, *and to prevent the execution of an Act of Congress by force and intimidation*, the offence in legal estimation is high treason; it is an usurpation of the authority of the government. It is high treason by levying war." In the cases of the *Northampton Insurgents*, Judge Iredell, in his charge to the Grand Jury, (A. D. 1799,) says,† "I am warranted in saying, that if in the case of the insurgents who may come under your consideration, the intention was to prevent by force the execution of any Act of the Congress of the United States altogether, any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason. But if its intention was merely to defeat its operation in a *particular instance*, or through the agency of a particular officer, from some private or personal motive, though a high offence may have been committed, it did not amount to the crime of treason. *The particular motive, must however, be the sole ingredient* in the case, for if committed *with a general view to obstruct the execution of the Act*, the offence must be deemed treason." This was the charge of Judge Iredell to the Grand Jury. *Fries* having been indicted by them, was tried before Judges Iredell and Peters, who iterate the doctrines just above declared. Judge Peters says,‡ "It is treason in levying war against the United States for persons who have none but a common interest with their fellow-citizens, to oppose or prevent by force, numbers or intimidation, a public and general law of the United

* The United States v. Vigol, Id. v. Mitchell, 2 Dallas, 346, 348; S. C. Wharton's State Trials, 175, 176, 182.

† Wharton's State Trials, 458, 480.

‡ Id. 534, 535.

For the United States.

States, with intent to prevent its operation, or compel its repeal."* Again, "although but one law be immediately assailed, yet the treasonable design is completed, and the generality of interest designated by *a part* assuming the government of *the whole*. . . . . Though punishments are designated by particular laws for certain *inferior* crimes, which if prosecuted as substantive offences, and the sole object of the prosecution, are exclusively liable to the penalties directed by those laws, *yet when committed with treasonable ingredients*, these crimes become only circumstances or overt acts. The intent is the gist of the inquiry in a charge of treason." Judge Iredell referring to the law laid down by Judges Patterson and Peters in the cases of the *Western Insurgents*, says,† "As I do not differ from that decision, my opinion is that the same declarations should be made upon the points of law at this time." On the second trial of *Fries*, in 1800, Judge Chase was on the Bench, and in an elaborate opinion he maintains the doctrine which had been ruled in the previous cases.‡ Judge Story, in 1842, says,§ "It is not necessary that it should be a direct and positive intention entirely to overthrow the government. It will be equally treason if the intention is by *force to prevent the execution of any one or more of the general and public laws of the Government*, or to resist the exercise of any legitimate authority of the Government in its sovereign capacity. Thus, if there is an assembly of persons, with force with intent to prevent the collection of taxes lawful, or duties levied by the government, or to destroy all custom-houses, or to resist the administration of justice in the Courts of the United States, and they proceed to execute their purpose by force, there can

* Wharton's State Trials, 591.

† Id.

‡ Id. 634.

§ 1 Story, 614.

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For the United States.

* Charge on the occasion of the Kensington riots, MS.

be no doubt it would be treason against the United States." President King of the Common Pleas of Philadelphia holds the same doctrine.* His language is, "that where the object of a riotous assembly is to prevent, by force and violence, the execution of any statute, or by force and violence to compel its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by law, as burning down all churches or meeting-houses of a particular sect, under colour of reforming a public grievance, or to release all prisoners in the public jails and the like, and the rioters proceed to execute by force their predetermined objects and intents, they are guilty of high treason in levying war." The case of the *United States* v. *Hoxie*,† is no exception to these principles. It was clearly no case of treason, but simply of a private outbreak.

† 1 Paine, 265.

The authorities and opinions quoted, thus prove that the forcible resistance to the execution of the Fugitive Slave law, in which the defendant participated, if designed to render its provisions inoperative and void, was treason against the United States. It was a levying of war within the meaning of the Constitution. The intent with which the act was committed, is the essential ingredient in the offence. We have then an uninterrupted line of decisions from the foundation of our government, until the present hour. It is unprofessional, and will be vain to attempt to discredit these earlier decisions on the law of treason. They have the force of that *contemporanea expositio quæ fortissima est.* The seats of judgment were never filled by abler, more learned, or purer men. The bar was never graced by more splendid talent, more intellectual force, greater devotion or more practised

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...h were Marshall, Patterson, ... At the bar was William ... the elder Dallas, and ... William Tilghman. ... more cogently, ...ter interest of ...emperately,

...re of the ...s and circum- ...saction. The com- ... defendant with others, ...aw at Christiana, can be ...t direct proof. "The concert ...ays Judge Kane,* "may be adduced ... concerted action itself, or it may be in- ...d from facts occurring at the time or after- wards, as well as before." It is not to be expected, that direct proof shall be brought, where a whole region is infected. We cannot enter a horde of traitors, and take thence voluntary witnesses to implicate directly those who think and feel as they do themselves. Because a whole county, a whole township, or a whole neighbourhood, are involved in plotting treason: and no eye-witness can be produced to prove their treasonable meetings, cannot treason be proved? cannot combination and wicked conspiracy be established, as any other fact in the law, by circumstantial evidence? If you see the stream which comes from the distant mountains, swollen and leaping along as if a deluge were pouring its waters through its channel, do you not know that the snows have melted at its source, and the rains have descended from the heavens? Cannot you judge the

* Ante, p. 137

's Sessions, 1851.

r the United ates.

cause from the effect? You see that the prisoner was ready to leap upon his horse as rapidly as possible, and go to the ground, to incite those who are assembling by concert to resist the laws; can you not infer that he went there by pre-arrangement, and that he was known by the coloured people as a man who would stand by them, in their resistance of the laws? You see them hail his presence with a shout, and see him stand by and read the process of the United States, saying not one word to these ignorant, misguided individuals, warning them of their danger, "though he had come to see justice done" to the blacks. He will not tell these ignorant people, who were about to imbrue their hands in innocent blood, "You are doing wrong, here is authority from the United States." Can you not infer concert and design from these things? Indeed there is no necessity for inferential proof, so far as this defendant is concerned. His resistance to the law was declared. He avowed his determination on the spot, not to regard the provisions of the Fugitive Slave Law, or any other act of Congress upon that subject, and in the presence of an armed band of negroes who had come together to resist the law, he declared that its supremacy should not be maintained by him, and that the rights of these insurgents were superior to any statute of the United States.

This man did not confine himself to mere sympathy, nor occupy a position merely passive; he was already connected with an organized band, which had been formed for treason. But suppose he was there as a spectator, and that he there first connected himself with an organization formed for the purpose of resisting the law? Is he not as guilty as the rest?

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But he had no arms in his hands! What of that? The coloured people then and there armed, were his instruments of war; they were his arms. If, while sympathizing with these blacks, and determined to resist this law, Hanway and Lewis had put on their armour and led their soldiers to the fight, they would have been at least heroes in their way. But to go there with no arms, to incite an ignorant and infuriated horde, who are there for the purpose of treason, murder and robbery; this is less manly, but no less treasonable. If Hanway incited them by word, speech, gesture, or presence, then he has done more than merely refuse to assist—he has become a conspirator. He has connected himself with them, their acts are his acts, and their intentions are his intentions.

For the Prisoner.

For the Prisoner. If the issue were on the Fugitive Slave Law, and the question was, whether Hanway disapproved it? he could not be convicted even of that. There is no certain evidence which shows that he has an opinion about that law. Admitting that he disapproved the law, as he had a right to, there is no evidence which shows what motive brought him to this spot on the morning of the 11th. The sounding of a horn about breakfast time (an usual signal in the country for breakfast) shows nothing; and if it were clearly shown to be a signal for concourse, it follows not that it was a concourse for a treasonable purpose. There is evidence that there was in the neighbourhood a gang of professional kidnappers, who, on recent occasions, without any authority, had seized black men and carried them away, so that they were never heard of again.

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And that in consequence of this, there was a general alarm and feeling of indignation in the neighbourhood—not against lawful authority, but against man-stealers. Lewis was informed exactly, that there were "kidnappers at Parker's house," and he gave that information and none other to Hanway. And it does not matter, that by the word "kidnappers" slave owners were sometimes called, since there had recently been people in the neighbourhood to whom the word strictly and legally applied. Now who can say on the evidence what took Hanway to this spot? It is the intent which here is every thing. For if Hanway came there with a lawful intent, it is no treason, even though he did afterwards see with composure the laws violated, or even commit a murder.

Treason in China, means disrespect to the Emperor. On the continent of Europe it has been reduced by the intrigues of faction, or the command of power, to about the same thing. In England there have been bad times, and the law has given way to party rage and power. At all times, indeed, their law of treason has confessedly been more extended than ours, and largely influenced by the ruling authorities. But the fathers of *our* government, deeming the life and liberty of the citizen of too much moment to be subjected to the sport of factious excitement, or to the spirit of power, have made the definition of treason a part of the paramount law, which every federal officer is sworn to support. This definition is short, plain, and precise; involved in no phrases of dubious import, or of technical subtlety. To the layman and way-faring man it simply declares what *is* treason. To the lawyer and the scholar, bewildered in the mazes of the metaphysical jargon

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with which judicial butchery, in violent times, racked their brains for reasons for doing wrong; to the judge and the juryman in admonition of the duty of discarding bad precedents and of abstaining from the extension of crime by construction, it does more; it declares what is *not* treason.* "Treason against the United States, shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." This definition was framed by men who, in the exercise of the right of revolution, had risked the penalties of treason, and studied the subject on the steps of the scaffold. Indignant at the wrongs that had been perpetrated, and the blood that had been shed for fictitious offences made treason by ingenious construction, they determined to deprive both faction and power of so potent an engine of mischief, long used and abused by demagogues and despots. They cut off at one blow, that once flourishing and fatal branch of interpretative treason. They defined the crime by terms severely strict and rigorously exact. Every word is significant. There is not a syllable to spare, nor one on the meaning of which sophistry can hang a doubt. "Treason shall consist *only* in levying war, &c." No court, no legislature, no power in the State shall make any thing else treason. The same words which gave to the acts enumerated the highest denomination in the catalogue of crimes, contain an emphatic prohibition against the slightest extension. The offence requires the existence of *war*. Its *sole* element is war. It cannot be committed in time of peace. To be guilty of the crime, a person must be actually engaged in the war, or giving aid to those that are. To contemplate, or to advise war, or even

* Constitution, Art. 3, Sect. III., § 1.

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to conspire to wage it, is not enough. The war must be actually levied. It must not be a mere tumult—a fight—a struggle in arms between individuals or companies, or violence offered to an executive or military officer of the government, in a matter relating only to individual interest or private right, but it must be national in its scope and object. It must possess that dignity in mischievous design that aims at the life of the government, or at least at the prostration of some branch of its power, by an armed opposition. It must have the impress of universality. A contest between the lords of neighbouring manors, involving the destruction of many lives by small armies, raised and maintained for the purposes of mutual revenge and plunder, was decided even by an English court, in violent times, to be no treason. An attack on the negro population of a town or city, by an armed mob of a thousand, such as have occurred in different parts of our country at different times, has never been supposed to be treason. A combination to destroy a newspaper press by violence, and to overcome all opposition by arms, and the purpose executed, as happened formerly in Baltimore, when the Federal Republican press was destroyed, General Lingan killed, and a number of other persons grievously injured; though the mob held possession of the city for days, overawed the police, and set the municipal authorities at defiance, was deemed no more than misdemeanor. The driving of the peaceable Mormons from the city of Nauvoo, at the point of the bayonet, and with no inconsiderable slaughter too, though battles were fought and a siege maintained, passed unnoticed by the United States government, as an offence cognizable

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only by the local tribunals. The same remark applies to the Philadelphia riots of 1844, when churches were burnt and houses destroyed, streets barricaded, and windows shaken by the thunder of artillery launched in civil strife, and a population of near half a million of persons stricken with terror, and forced to call on the country for protection. Such cases, though wearing much the appearance of war on a limited scale, and possessing many of its characteristic features, do not amount to war, in the constitutional sense, as generally received and understood.

Upon the question, what constitutes a levying of war, there have been several determinations in the Federal Courts. The first occasion that occurred for its consideration, was that of the Western insurrection in 1794, five years after the constitution was adopted. The second was Fries's case, or the Northampton insurrection, only five years later. The government in these times was new, the treasury exhausted, and the nation comparatively weak. The trial of the great experiment of a constitutional republic was considered of doubtful success, and was watched with earnest solicitude by the statesmen of the day. The value of the Union was still a debateable subject. Reverence for the constitution had not become a common sentiment. We were in the midst of the old French revolution, "When," as the jurors say, in asking a copy of Judge Iredell's charge to them,* "false philosophy and the most dangerous and wicked principles were spreading with rapidity, under the imposing garb of liberty, over the fairest countries of the old world." In every speck of disaffection there was danger. Every open opposition

* Wharton's State Trials, 481, n.

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to the regular action of the government, furnished just cause for alarm. The federal authority was in the hands of men who held high-toned opinions, and who were disposed to carry out these opinions, in the exercise of their official functions. The judges had been educated in the English law, and naturally looked for their guides to the precedents which that law furnished, and which were established in dark and remote periods, and could not anticipate the more liberal and enlightened sentiments which have since animated English jurisprudence. Under such circumstances we should reasonably expect to see strong ground taken and strong doctrine promulgated. And such we find actually to have been the case. Under different circumstances the law might have been, and probably would have been, differently ruled; or general principles laid down less broadly. As it was, they gave great dissatisfaction, and have been subjected to severe criticism by learned commentators. Still, as far as they bore upon the particular circumstances under investigation, in application to the facts proved by the evidence in the several cases, they may perhaps be safely admitted to have the force of precedents. But they are not to be received as bearing upon a case varying in any material point from those in hand.

The Western insurrection was an extensive combination, embracing great numbers of the inhabitants beyond the Alleghany mountains, not only of the State of Pennsylvania, but of Virginia also, to resist by force the execution of an Excise law of the general government. It commenced in 1791, and continued till 1794. It was originated and fomented and supported by what was called sometimes the Anti-

Federal or Republican, and sometimes the Jacobin or Democratic, party. It was composed of men who, like Gallatin and others represented by the "Aurora," had opposed with the utmost violence the adoption of the Federal Constitution, and who, after its adoption, sought to paralyse and destroy its operation; men who hated the person and opposed the administration of Washington, whose history yet remains to be written, "The Enemies of Washington," and who in pursuance of their objects, sought in theory and in fact to overthrow the *government*. The party had not *then*,—adopting the Federal Constitution,—sought to qualify its operation by a jealous construction. They had opposed violently its adoption. Failing in this, they sought, when it *was* adopted, to *nullify* its operation; which was to overthrow it in fact. Application was made to Congress for a repeal of the obnoxious Act. That having failed, resort was had to force, and within the disaffected territory the Excise law was as effectively annulled as though it had been repealed by Congress. Even those who were disposed to obey it, were prevented through the terror of the insurgents. Proclamations were issued by the President; requisitions were made on the militia of New Jersey, Pennsylvania, Maryland, and Virginia; and our army, composed of several divisions, and commanded by an officer of high military reputation, was marched into the disaffected region, and a considerable force under General Morgan was left to occupy it as a conquered country. It was in view of such circumstances that the language quoted by the Prosecution, was employed. Judge Paterson declared that the object of the insurgents "was of a general nature, and of a national concern." The

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magnitude of the effort was in proportion to that of the object, and required no inconsiderable exertion of the force of the nation to defeat it; it was therefore deemed *a war*, and those that waged it in opposition to the national authority, traitors.

The Northampton insurrection out of which Fries's case arose, had much the same origin, though the rebellion was not of equal extent; and owing to the prompt and efficient action of the government, did not become so formidable. Three large counties, however, were engaged in the opposition, which assumed an aspect sufficiently threatening to require the interposition of the military force. The legislature of Pennsylvania resolved to co-operate with the general government, in case it should become necessary, and the authority of the Executive of the State, as well as of the Union, was actively exerted to suppress the spirit of resistance. The object of the insurgents was to obtain a repeal of the house and direct tax law; they proceeded to acts of violence, and they succeeded in impressing the public with the opinion, or at least the apprehension, that they had sufficient power to effect their purposes. It was in reference to such circumstances that the judges delivered the charges quoted by the Prosecution. They did not decide that these circumstances constituted a levying of war, but they presented the case in such a way as gave a pretty clear intimation of their opinion, and on a precisely similar state of facts, those opinions would operate with great weight. Still the general expressions are to be applied to the cause then in hand, and not to a cause altogether differently constituted.

The report of the Fries case makes Judge Peters

say, "it is treason in levying war against the United States, for persons who have none but a common interest with their fellow-citizens, to oppose or prevent by force, numbers, or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal;" and this passage is torn from its context, and presented here by the counsel of the United States, as an authoritative exposition of the law of treason. The force of the language is more readily perceived by rejecting all superfluous words, throwing out such members of the sentence connected by the disjunctive conjunction, as obscuring the point, and making a somewhat different collocation of those retained, by placing the verb and the object nearer together. Thus, "it is treason, in levying war against the United States, to oppose by intimidation a general law, with intent to prevent its execution." This is the concentrated sense of the passage, and if it is to be considered as announcing a general principle, applicable to all cases, as the Prosecution would have us suppose, it is to be taken as declaring that levying war, in the meaning of the Constitution, does not require force, but only intimidation, and that the intent with which the intimidation is used, need not go beyond the prevention of the execution of a law of Congress, in any particular instance. The words are without qualification. To smuggle goods is to prevent the execution of the revenue laws, and to threaten an officer of the United States, attempting to execute those laws, so as to intimidate him, would be treason, if this is all that would be required to constitute it. Even to prevent a United States Marshal by intimidation from summoning a juror to attend this Court,

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would, according to this construction, amount to the same offence. But this was not the meaning of Judge Peters. He spoke in reference to the facts before him, the means used and the object avowed. He intended merely to recognize the decision in the case of the *Western Insurgents*, and to do no more, for he says in immediate connection with the passage excerpted from his opinion: "Force is necessary to complete the crime, but the quantum of force is immaterial. The point was determined by this Court on a former occasion, which was, though not in all circumstances, yet, in principle and object, very analogous to the subject of our present inquiries. I hold myself bound by that decision, which, with due consideration, I think legal and sound." What that decision was, we know; for the facts have become a subject of history; and the decision was, that there was a levying of war within the meaning of the Constitution. But what the charge of the Court was, we do not know. We have no report of it, but only of what is said to be *its substance*. We have not the language of Judge Paterson, and who can say that there has been no transmutation in the process of condensing; or, that the meaning has been faithfully preserved, while many of the words that conveyed that meaning have been omitted, and the phraseology changed? As the book has it, he says: "The first question to be considered, is what was the general object of the insurrection? If the object was to suppress the excise offices, and to prevent the execution of an Act of Congress by force and intimidation, the offence in legal estimation is high treason. It is an usurpation of the authority of the government. It is high treason by levying war; taking the testimony in a na-

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tional and connected point of view. This was the object. It was of a general nature and of national concern."* In this description of the offence, we recognize nothing of the accuracy or finish, which characterize the productions of that jurist, and it is most certain, that it does not embody his whole meaning. For it cannot be doubted that an insurrection to suppress the excise offices of a limited district of country, and to prevent the execution of an Act of Congress therein, through a spirit of private revenge, with a view to individual interest, or for purposes of plunder, though by force and intimidation, would not amount to a levying war, and would not be treason; and it is an imputation upon the impartiality of the judge, to suppose that he was not careful in describing the crime of which the defendants were accused, and to attribute to him an omission in that description of the main ingredient of the offence—the intent with which the overt acts were done. All that we have therefore in relation to the subject of levying war, in the reports of the trials of the *Western Insurgents*, and of *Fries*, in the Northampton case, is very little, and that little of no authority, beyond the cases decided. When such cases occur again, but not before, they will be precedents.

* Wharton's State Trials, p. 182.

I leave out of view the charges to grand juries, from which the prosecution has made quotations, because they do not possess the character of authority; and though entitled to respect as the opinions of eminent men, are entitled to no more respect than the opinions of other men equally or much more able, who have never held judicial positions. Such charges are delivered without the benefit of argument by counsel, and only as guides to an in-

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quiry preliminary to the trial. The charge of Judge Chase to the jury, in the second trial of Fries, may be put in much the same category as charges to grand juries; as by his arbitrary conduct on the trial, he drove the counsel for the prisoner out of court, and deprived himself of the assistance which he might have received from their arguments, in interpreting the law. It is pertinent however to remark, that in his statement of the law, he has been more precise, exact and definite, than either of the judges whom the prosecution has quoted. "It is," says he, "the opinion of the Court, that an insurrection or rising of any body of the people, to prevent by force or violence, any object of a great public nature, of public, general, or national concern, is a levying of war against the United States, within the contemplation and construction of the Constitution." And he takes the precaution further to observe: "The Court are of the opinion, that the assembling of bodies of men armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace-officers, should be insulted or resisted, or even great outrages committed to the persons or property of our citizens."

The prosecution has referred to this opinion without reading it. It happens not to fall into their line of argument so well as the looser phraseology, attributed to Judges Paterson and Peters. Its terms are still very general, and they need the illustration which is furnished by the facts to which they were applied. Those facts have been already adverted to. A wide spread disaffection existed. Formidable preparations were made to resist the law by force in three counties, and actual resistance had been made,

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yet the Court in the case of Fries, has been universally considered as having carried the law of treason to the utmost allowable limits, if it has not surpassed them.*

* Vol. 2, p. 274.

Mr. Luther Martin, in his argument on Burr's trial, after proving by authority, "that an assemblage of men, even armed in military array, is not to be considered as treasonable, unless their intention be proved to be treasonable, that is, (applying the doctrine to this country,) unless the intention be to subvert the government of the United States," uses this strong language. "Sir, I execrate a contrary doctrine as highly tyrannical and oppressive. And here I beg leave to enter my censure against the decisions of the Court of Pennsylvania on this subject, in the cases of what were called the whiskey and hot water insurrections. Some of them were decided, in my opinion, improperly, to be guilty of treason, according to the Constitution of the United States. ..... I think it my duty to enter my solemn protest against the decision of the Court in those cases, although made by gentlemen of learning and integrity; and if ever the question should come before the Supreme Court, I will endeavour to show that those decisions were illegal and improper. In those cases there was no design to subvert the government. Such a thought was not entertained. It was the expression of their disapprobation of a particular law, and an opposition to the execution of that unpopular law, and the intention of those people went no further than to induce its repeal. But according to the authority already referred to, though war was levied with all the solemnities of actual war, though violent acts were committed and a number

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of people killed, yet the parties engaged in it would be only guilty of a great riot, or at most, of murder, but not of treason, on this principle, that their intention was not treasonable, *that the subversion of the government was never in their contemplation.*"

* 1 Paine, 265.

In *The United States* v. *Hoxie*,* in 1808, Judge Livingston cites the Western Insurgent cases, and Fries's case, without approbation, and draws broadly the line of distinction between such public systematised insurrections as threaten the existence of the government, and those minor offences, which partake more or less of opposition to the laws of the United States, but which from their suddenness, imbecility, and want of organization, are incapable of making a serious impression upon the peace of the nation.

In *The United States* v. *Fries*, Judge Chase has drawn his description of treason from the English authorities, but has omitted those specifications which assist to explain the sense of the commentator and limit the application of the terms employed, and it is useful, therefore, to refer to those authorities for a more definite idea of what is meant by levying war.

† 1 Pleas of the Crown, 142–50.

Lord Hale says,† "An actual levying of war against the king, consists of two principal parts or ingredients, namely; First, it must be a levying of war: second, it must be a levying of war against the king. What shall be said to be a levying of war is partly a question of fact. For it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war, (for then every riot would be treason, and all the acts against riotous and unlawful assemblies had been vain and needless,) but it must be such an assembly as carries with it *spe-*

ciem belli; as if they ride or march *vexillis explicatis,* or if they formed into companies, or were furnished with military officers; or if they are armed with military weapons, as swords, guns, balls, halberts, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war."

The language of Justice Foster,* though not so particular in the enumeration of the circumstances necessary to constitute a levying of war in the sense of the statute, is to the same general effect. And he adds, that an insurrection to throw down *all* inclosures in a *particular place* or *county,* to pull down all brothels in a particular town, or to remove a local nuisance, is not such an insurrection as amounts to a levying of war.

*Crown Law, p. 209.

The last decision in the American courts is that in *The United States* v. *Hoxie,* already mentioned. In that case Vandusen had sent a raft of timber to be transported to Canada, in violation of the embargo laws. It was seized on its way by the collector of Vermont, and placed in the custody of a company of militia. While the company were at some distance from the raft, a company of about fifty men, hired for the purpose, and armed, some of them with a dozen muskets, and the rest with clubs and spike poles, assembled with the intention of rescuing the raft, and if necessary, of making prisoners of the troops that guarded it. They got possession of the raft without resistance, no one being near it, and proceeded towards Canada. In about an hour, as the raft passed a point of the shore twenty rods distant, the troops fired upon it, and those on the raft returned the fire. This firing continued until the raft was beyond the reach of musket shot. About

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For the Prisoner.

one hundred shots were fired from the raft, and the balls struck trees on the shore, and the shot from shore also struck the raft, but no persons were wounded. The firing was in earnest, and intended for execution.

Here was a combination of men to prevent the execution of an act of Congress by force, the authority of the United States successfully resisted, and the occurrence of an actual skirmish between an armed body and troops in the service of the nation sent to defeat the unlawful enterprise. Not a single ingredient of treason is wanting as the prosecution expounded the word: yet the Court decided that the offence was not treason. "A levying of war," says Judge Livingston, "without having recourse to rules of construction or artificial reasoning, would seem to be nothing short of the employment, or at least, of the embodying of a military force, armed and arrayed in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of Congress. These troops should be so armed and so directed as to leave no doubt that the United States or their government were the immediate object of their attack."

The Charge. Grier, J.

Grier, J. Whether the allegations of this bill of indictment are supported by evidence, is the matter which you are sworn to try.

In assisting you to arrive at a correct conclusion on these points, it is not the intention of the Court to intimate an opinion on any disputed fact. But there are certain facts in the case which have not been disputed by the learned counsel, and which, in speaking of this case, we may assume to have been satisfac-

Oc'r Sessions, 1851.

The Charge. Grier, J. Facts admitted.

torily proved, as they have not been denied. They are these:—

That Mr. Edward Gorsuch, a citizen of Maryland, was the owner of certain slaves, or persons held to labour by the laws of that State. That these slaves had escaped and fled into Pennsylvania, and were known to be lurking in the neighbourhood of the village of Christiana, Lancaster county. That Mr. Gorsuch came to Philadelphia in September last, and obtained warrants, for the arrest of these fugitives, from a commissioner of this Court, having authority by law to issue such warrants. That these warrants were put into the hands of Kline, an officer duly authorized to execute them. That on the morning of the 11th of September, about daylight, Kline, accompanied by Gorsuch, his son, nephew, and cousin, and two other persons, citizens of Maryland, proceeded to the house of one Parker. That a person who was recognized as one of the fugitives for whom the warrants had been issued, was seen to come out of the house. That the fugitive on seeing the officer and his company, immediately fled into the house and up stairs, leaving the door open behind him. That Mr. Gorsuch pursued him, followed by the officer. That a number of negroes were collected up stairs, armed in various ways and determined to resist the capture of the fugitives. That a gun was fired by one of them at Mr. Gorsuch, and others of his assistants were struck with missiles thrown from the upper windows. That a pistol was then fired by the officer, not aimed at the negroes, but rather to frighten them and let them know their assailants were armed. That a parley was then held between the parties, and the negroes informed that the officer had legal pro-

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cess in his hands for their arrest. That the negroes demanded time for the purpose, as was supposed, of offering terms of surrender, but in reality, perhaps, to gain time for the arrival of assistance from the neighbourhood. That after some lapse of time, the defendant arrived on the ground, and at the same time, or soon after, large numbers of negroes began to collect around with various weapons of offence, such as guns, clubs, scythes, and corn-cutters. That on the arrival of these reinforcements, the persons in the house set up a yell of defiance. That the officer made known his character, and exhibited his writs to the defendant, and another white man who had arrived on the ground, and demanded their assistance in executing the warrants, which was refused. That the officer deeming the attempt to execute his writs in the face of a numerous armed and angry mob of negroes hopeless, made no further attempt to do so, being content to escape with his life. That the mob of armed negroes, now amounting to near or over one hundred persons, immediately made an attack upon the party who attended the officer. Mr. Gorsuch was then shot down, beaten with clubs, and murdered on the spot. His son, who came to his assistance, was shot and wounded, and with difficulty escaped with his life. That the nephew was surrounded and beaten, but escaped with his life; and that on the preceding evening, notice had been given in the neighbourhood, by a negro who had followed the officer from Philadelphia, that an arrest of the fugitives was intended, and that the concourse and riot of the morning, was evidently by preconcert and in consequence of such information.

Without at present further noticing the history of

the transaction, or expressing any opinion of the conduct of the white people in the neighbourhood, on the occasion, we may say that the evidence has clearly shown that the participants in this transaction are guilty of riot and murder at least: Whether the crime amounts to treason or not will be presently considered.

Two questions present themselves for your inquiry:—

1st. Was the defendant, Hanway, a participant in the offences proved to have been committed? Did he aid, abet or assist the negroes in this transaction, without regard to the grade or description of the offence committed?

2d. And secondly, if he did, was the offence treason against the United States, as alleged in this bill of indictment?

The first of these questions is one wholly of fact, and for your decision alone. The last is a mixed question of law and fact. On the law, you have a right to look to the Court, for a correct definition of what constitutes treason, but whether the defendant has committed an offence which comes within that category, is, of course, a matter of fact for your decision.

Meaning of aid, abet and assist.

When a murder is committed, all who are present, aiding, abetting and assailing, are equally guilty with him who gave the fatal stroke. An abettor of a murder in order to be held liable as a principal in the felony, must be present at the transaction; if he is absent, he may be an accessory. But in treason all are principals, and a man may be guilty of aiding and abetting, though not present. "If one man watch while another breaks into a house at night and robs

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THE CHARGE. GRIER, J. Meaning of aid, abet and assist.

it, both are guilty of burglary." "If A. comes and kills a man and B. runs with an intent to assist him, if there should be occasion, though in fact he doth nothing, yet he is a principal, being present as well as A." "If divers persons come with one assent to do mischief, as to kill, rob or beat, and one doth it, they are all principals in the felony." "If many be present, and one only gives the stroke, whereby the party dies, they are all principals." "Thus if two fight a duel, and one of them is killed, the seconds who are present, are both guilty of murder." "If A. and B. be fighting, and C. a man of full age comes by chance, and is a looker-on only, and assists neither, he is not guilty of murder or manslaughter, but it is a misprision for which he shall be fined, unless he uses means to apprehend the felon." Lastly, "if divers persons come in one company, to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting him, and consenting to the act, or ready to aid him, although they did but look on."

I have given you these examples from the books, in order that you may form some idea as to the nature of what the law treats as criminal; and what it regards as aiding, abetting and countenancing the perpetration of an offence.

In the present case, Hanway was confessedly present. But did he come to aid, abet, countenance or encourage the rioters? If so, he was guilty of every act committed by any individual engaged in the riot —whether it amount to felony or treason.

There is no evidence of any previous connection of

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Meaning of aid, abet and assist.

the prisoner with this party, before the time the offence was committed—that he had counselled, advised or exhorted the negroes to come together with arms and resist the officer of the law or murder his assistants.

There is no evidence, even, that the prisoner was a member of any of these associations or conventions, which occasionally or annually infest the neighbouring village of West Chester, for the purpose of railing at and reviling the Constitution and laws of the land, and denouncing those who execute them as no better than a Scroggs and a Jeffries—who stimulate and exhort poor negroes to the perpetration of offences, which they know must bring them to the penitentiary or the gallows.

The fact of his interference, whether active or passive, of his aiding, counselling or abetting the perpetrators of this offence, has been argued from his language and conduct during its perpetration in his presence.

His acts, his declarations and his conduct, are fair subjects for your careful examination, in order to judge of his intentions or his guilty complicity with those whose hands perpetrated the offence. If, as the counsel for the United States have argued, he countenanced or encouraged, aided or abetted the offenders in the commission of the offence, he is equally guilty with them. If, on the contrary, as is argued by his counsel, he came there without any knowledge of what was about to take place, and took no part by encouraging, countenancing, or aiding the perpetrators of the offence—if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a

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The Charge. Green, J. Meaning of aid, abet and assist.

fugitive from labour, and therefore merely refused to interfere, while he did not aid or encourage the offenders, he may not have acted the part of a good citizen; he may be liable to punishment for such neutrality by fine and imprisonment, but he cannot be said to be liable as a principal in the riot, murder and treason, committed by the others—and much more so if, as has been argued, his only interference was to preserve the lives of the officer and his attendants. A man may have such conscientious principles on the subject of non-resistance, as to stand by with indifference and neutrality, when his father or friend is attacked by a madman, and in case of his death may not be liable as an aider or abettor in the murder or manslaughter. We may wonder at his philosophic indifference, though we cannot admire the man. So a man who is a mere spectator in a contest where a mob of rioters are resisting an officer of the law in the execution of his duty, may refuse assistance, countenance or aid to either side. In so doing he is not acting the part of an honest, loyal citizen; he may be liable to be punished for a misdemeanor for his refusal to interfere, but such conduct will not necessarily make him liable as a principal in the riot or murder committed.

But such conduct is a fair subject for the consideration of a jury, in connection with other circumstances, to show preconcert and guilty complicity with the rioters, murderers or traitors.

What inference the jury may draw from the evidence in this case of the conduct of this prisoner, is for them to say, after carefully weighing the arguments which have been so ably urged by the learned counsel.

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THE CHARGE. GRIER, J.

With these remarks we submit this point of the case to the jury, after reading to them, *if they desire it,* the testimony of the witnesses bearing more directly on this question.

If you should find that the defendant Castner Hanway did *not* aid, assist or abet in the perpetration of the offence, you will return a verdict of not guilty, without regard to the grade of the offence; whether riot, murder, or treason. But if you should find that he has so aided and abetted, so as thereby to become a principal in the transaction according to the rules of law which we have just stated, you will next have to inquire whether the offence as proved, amounts to the crime of "Treason against the United States."

Treason defined.

The bill charges the defendant with "wickedly and traitorously intending to *levy war* against the United States:" and the jury must find the act or acts to have been committed with such intention. For although the prisoner may have been guilty of riot, robbery, murder, or any other felony, he cannot be found guilty under this bill of indictment, unless you find that he *intended to levy war against the United States,* or that the acts were committed by himself and others in pursuance of some conspiracy or preconcert for that purpose; and this is a question of fact for the decision of the jury. But in the decision of it, the jury should regard the construction of the Constitution as given them by the Court as to what is the true meaning of the words "*levying war.*"

Treason against the United States, is defined by the Constitution itself. Congress has no power to

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Treason defined.

enlarge, restrain, construe or define the offence. Its construction is entrusted to the Court alone. By this instrument it is declared that "Treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." What constitutes "levying war against the Government," is a question which has been the subject of much discussion, whenever an indictment has been tried under this article of the Constitution. The offence is described in very few words, and in their application to particular cases, much difference of opinion may be expected. We derive our laws as well as our language from England. As we would apply to English dictionaries and classical writers, to ascertain the proper meaning of a particular word, so when we would inquire after the true definition of certain legal phraseology we would naturally look to the text writers and judicial decisions which we know that the framers of our constitutions would regard as the standard authorities in questions of legal definition. Otherwise the language of the Constitution on this subject might be subject to any construction which the passion or caprice of a court and jury might choose to give it in times of public excitement. At one time the Constitution might be nullified by a narrow construction, and at another time the life and liberty of the citizen be sacrificed by a latitudinous one.

The term "levying war," says Chief Justice Marshall,* "is not for the first time applied to treason by the Constitution of the United States. It is a tech-

* Burr's Trial, vol. 2, p. 402.

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The Charge. Grier, J. Treason defined.

nical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution, in the sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed, must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context."

Since the adoption of the Constitution but few cases of indictment for treason have occurred, and most of them not many years afterwards. Many of the English cases, *then* considered good law and quoted by the best text writers as authorities, have since been discredited, if not overruled, in that country. The better opinion there at present seems to be, that the term "levying war" should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies.

But for the purposes of the present case, it is not necessary to pursue this subject further, or to look beyond the cases decided in our own country. The subject is one of too serious importance to allow this Court to indulge in speculations, or wander from the safe path of precedent.

In England, all insurrections to imprison the king, or to force him to change his measures, or to remove evil counsellors; to attack his troops in opposition to his authority; to carry off or destroy his stores, pro-

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Treason defined.

vided for defence of the realm; if done conjointly with and in aid of rebels or enemies, and not only for lucre or some private and malicious motive; to hold a fort or castle against the king or his troops, if actual force be used in order to keep possession; to join with rebels freely and voluntarily; to rise for the purpose of throwing down by force, all enclosures; alter the law or religion, &c.; to effect innovations of a public and general concern, by an armed force, or for any other purpose which usurps the government in matters of a public and general nature. All these acts have been deemed "a levying of war." So also have insurrections to redress by force national grievances; or to reform real or imaginary evils of a public nature, and in which the insurgents had no private or special interest, or by intimidation to force the repeal of a law.

But when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government, by numbers and armed force, it will not amount to treason. In the case of *Bollman and Swartout*, in the Supreme Court of the United States,* it is declared "that it is more safe, as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases;" "that to constitute the specific offence, war must be actually levied against the United States;" that "to conspire to levy war, and actually to levy war, are distinct offences;" and that "to complete the crime of levying war, there must be an actual assemblage of men for the purpose."

*Ex parte Bollman & Swartwout, 4 Cranch, 75,127,126,128.

This case also recognized the doctrine which had been previously laid down by Judge Chase in Fries's

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case,* that "if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States, by force, they are guilty only of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime, whether by one hundred or one thousand persons, is wholly immaterial:" and that "a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force, connected with the intention, will constitute the crime of 'levying war.'" In *Mitchell's Case*,† it was decided that to resist or prevent by armed force, the execution of a particular statute of the United States, is a levying war against the United States, and consequently treason, within the true meaning of the Constitution.

* Wharton's State Trials, 634, 5.

† United States v. Mitchell, Wharton's State Trials, 176.

And in Fries's case already mentioned, 'that an insurrection or rising of any body of people within the United States, to attain by force or violence any object of a great public nature, or of public, (or national) and general concern, is a levying of war against the United States." "That any such insurrection or rising to resist or prevent by force or violence the execution of any statute of the United States," "under any pretence, as that the statute was unjust, burthensome, oppressive or unconstitutional, is a levying of war against the United States within

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Treason defined.

the Constitution." And in a case in the Circuit Court of New York,* it was declared that "if the intention be, to prevent by force of arms, the execution of any act of Congress altogether, any forcible opposition calculated to carry that intention into effect, is levying war against the United States. But the resistance of the execution of a law of the United States accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offence, the object of the resistance must be of a public and general nature. I do not think it necessary to quote further from the decisions of my predecessors. It will suffice to say that the late charge of my brother† Kane to the Grand Jury, in the Circuit Court, contains what I believe to be a correct statement of the decisions on this subject, and that I fully concur in the doctrines stated, and the sentiments expressed in it.

* United States v. Hoxie, 1 Paine, 265.

† Ante, p. 135.

In the application of these principles of construction to the case before us, the jury will observe, that the "levying of war," against the United States, is not necessarily to be judged of alone by the number or array of troops. But there must be a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers. The conspiracy and the insurrection connected with it must be to effect something *of a public nature*, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution, or compel its repeal. A band of smugglers may be said to set the laws at defiance, and to have conspired together for that purpose, and to resist by armed force, the execution of the revenue laws; they may have battles with the officers of the revenue, in which

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numbers may be slain on both sides, and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but merely for private lucre or advantage. A whole neighbourhood of debtors may conspire together to resist the sheriff and his officers, in executing process on their property—they may perpetrate their resistance by force of arms—may kill the officer and his assistants—and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not of a public nature; their object is to hinder or remedy a private, not a public grievance. A number of fugitive slaves may infest a neighbourhood, and may be encouraged by the neighbours in combining to resist the capture of any of their number; they may resist with force and arms, their master or the public officer, who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object, and connected with no public purpose.

It is true that constructively they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws, and the anti-renters the execution laws. Their insurrection, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called *levying war*. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal.

Without desiring to invade the prerogatives of the

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THE CHARGE. GRIER, J. Treason defined.

jury in judging the facts of this case, the Court feel bound to say, that they do not think the transaction with which the prisoner is charged with being connected, rises to the dignity of treason or a levying of war. Not because the numbers or force was insufficient. But 1st, For want of any proof of previous conspiracy to make a *general and public resistance to any law* of the United States. 2dly, Because there is no evidence that any person concerned in the transaction knew there were such acts of Congress, as those with which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed kidnappers, (by which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein.)

The testimony of the prosecution shows that notice had been given that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you may call it, was but a sudden "*conclamatio*" or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, so far as we are informed, no attempt had been made to arrest fugitives in the neighbourhood under the new act of Congress by a public officer. Heretofore arrests had been made not by the owner in person, or his agent properly authorized, or by an officer of the law. Individuals without any authority, but incited by cupidity, and the hope of obtaining the reward offered for the return of a fugitive, had heretofore undertaken to seize them by force and violence, to invade the sanctity of pri-

vate dwellings at night, and insult the feelings and prejudices of the people. It is not to be wondered at that a people subject to such inroads, should consider odious the perpetrators of such deeds and denominate them kidnappers—and that the subjects of this treatment should have been encouraged in resisting such aggressions, where the rightful claimant could not be distinguished from the odious kidnapper, or the fact be ascertained whether the person seized, deported or stolen in this manner, was a free man or a slave. But the existence of such feelings is no evidence of a determination or conspiracy by the people to publicly resist any legislation of Congress, or levy war against the United States. That in consequence of such excitement, such an outrage should have been committed, is deeply to be deplored. That the persons engaged in it are guilty of aggravated riot and murder cannot be denied. But riot and murder are offences against the State government. It would be dangerous precedent for the Court and jury in this case to extend the crime of treason by construction to doubtful cases, and our decision would probably operate in the end to defeat the purposes of the law, which the government seeks to enforce.

I cannot conclude this charge to the jury, without availing myself of the occasion which it offers, to express the satisfaction which the Court has in seeing here the Attorney-general of the State of Maryland and the private counsel associated with him: for although the ordinary officers of the United States are deserving of all praise for the vigilance, ability and learning they have shown in bringing offenders to justice, the indignation felt by the people of Maryland at the calamitous and disgraceful murder of Mr.

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Gorsuch, are most natural indeed; and we receive their representatives here, in defence of the law, with cordial respect and readiness, in the hope that it may efface all angry feeling between the people of these two States, and foster those of respect and friendship.

Verdict.

After an absence of twenty minutes, the Jury returned a verdict of NOT GUILTY.

[APRIL SESSIONS, 1852, NO. 1, CRIMINAL DOCKET.]

MAGNIAC V. THOMSON.

[EQUITABLE RELIEF: EFFECT OF DEMURRER IN EQUITY: UNCONTROLLABLE EFFECT OF A LIBERATION ON CA. SA.: RELIEF AGAINST MISTAKE OF LAW.]

Where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake—allegations or averments in the bill that there was fraud or mistake, and the expressions 'fraudulently,' 'deceitfully,' 'by mistake,' &c., interspersed throughout it, will not bring the case within equitable jurisdiction, *even on a demurrer to the bill.*

Admitting, for the sake of argument, that the allegation of a mistake of the law would give jurisdiction to a court of equity in a common case, and be a ground for relief; yet the Court will not listen to the allegation that a member of the bar has made such a mistake. It can hardly be successfully averred even by the party whose counsel, he would confess, has made it.

Where one, having arrested his debtor defendant on a *ca. sa.*, sets him at liberty on certain terms, at *his* instance, it being "expressly acknowledged" by the defendant that this is done "for *his* accommodation, *without any prejudice whatever* to arise to the plaintiff's right by the enlargement" as aforesaid, "or *otherwise howsoever*;" the debt is paid at law. No further execution of any sort can be issued there. And the agreement having been drawn and signed by the plaintiff's own attorney, a learned and able counsellor at law, a Court of Equity will not interpose to enjoin the defendant from pleading this discharge as payment, by allegations in a bill *demurred to*, that there was either a mistake common to both parties as to the effect of the agreement; or else that the plaintiff not knowing its effect, while the defendant did know it, it would be a fraud in the defendant now to profit of the plaintiff's misconception or ignorance of what he was doing; and set up at law the payment by his liberation on the *ca. sa.*

Ap'l Sessions, 1852.

Statement.

On the 19th of December, 1825, John R. Thomson, now a Senator of the United States from the State of New Jersey, previously to a marriage then contemplated with a daughter of the late Honourable Richard Stockton, Esquire, of that State, agreed with her father to make a settlement upon that lady of a considerable estate upon this, as a final, among several other previously mentioned trusts, st. that if there should be *no issue* of their marriage, then the said estate should, on the death of either party, go

Ap'l Sessions, 1852.

Statement.

to the survivor. From a really insolvent condition of Mr. Thomson's affairs at that date, arising from a large foreign *suretyship*, contracted by his agent abroad, and from other circumstances confessedly not known to Mr. Stockton or his daughter, it appeared afterwards to be a matter of doubt whether this settlement could be supported as against creditors. And Mr. Thomson having been arrested soon after the settlement on a *ca. sa.* by these same persons who are now here complainants, Magniac & Co., and who were then creditors by judgment for about $22,000, in a common law suit in this Court, he made on the 8th April, 1830, the following agreement, an opulent relative being a guaranty for its performance, and Charles Jared Ingersoll, Esquire, the attorney of the plaintiffs, Magniac & Co., who himself drew the agreement, consenting by writing to the "defendant's *enlargement* on the terms stated" in it. The agreement—referring to the original case, in this Court, of No. 18, October Term, 1826,—being, as already stated, in Mr. Ingersoll's handwriting, was filed among the court papers of the case, and was in these words: "Defendant having been taken by *ca. sa.* in this suit, *at his instance*, it is agreed that he be set at liberty on giving security to abide the event of an issue to be formed for ascertaining, by judicial decision, whether he has the means, *by the property in his marriage settlement, or otherwise, of satisfying the judgment.* Both parties hereby consenting to try such issue at the ensuing session of the Circuit Court of the United States, on the merits, without regard to form. It being *expressly acknowledged by the defendant that this agreement is made for his accommodation, without any prejudice whatever to arise to the plaintiffs'*

right by the defendant's enlargement on security as aforesaid or otherwise howsoever."

The marshal accordingly returned to his *ca. sa.* "c. c. and *enlarged by agreement of plaintiffs' attorney.*" With a view to carry out the agreement, Mr. *Ingersoll,* for his clients, Magniac & Co., and *J. P. Norris,* Esquire, as attorney for Mr. Thomson, on the 3rd June, 1830, made this second agreement: "Whereas, a feigned issue has been agreed upon by the parties in this case, for the purpose of ascertaining, by law, whether the defendant, J. R. Thomson, has the means, by the property of his marriage settlement, or otherwise, of satisfying the judgment recovered against him in this Court, to October Sess. 1826, No. 18:—now, it is hereby agreed to be the understanding of the parties to the suit, if the plaintiff recovers, that the liability of the security for said defendant shall be to the extent of the property actually settled by said defendant on his intended wife, by virtue of a marriage settlement, dated the 19th day of December, 1825. And if judgment shall be for the defendant, that the said property contained in said settlement, *shall be entirely discharged,*" and the security entered as above stated, entirely at an end, &c.

The validity of the marriage settlement was tried in this Court at April Term, 1831, in the case, well remembered in this circuit, of *Magniac & Co.* v. *Thomson,** where after a vigorous assault upon it by Messrs. *J. R.* and *C. J. Ingersoll,* the settlement was powerfully and successfully defended by Mr. *Binney,* and under a strong charge of the late Mr. Justice Baldwin, sustained by a verdict of a jury. From this Court the case was taken, in 1833, to the Supreme

* Baldwin, 344.

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Court at Washington,* where the principles of Judge Baldwin's charge were the subject of another sharp attack, but where it was the unanimous opinion of the Court, that the judgment of the Circuit Court ought to be affirmed. The marriage settlement therefore could never be disturbed. There was no issue of the marriage, and Mr. Thomson having survived his wife, he became of course entitled under the terms of the settlement to the whole of the property himself. The complainants now filed this their bill in Chancery for an account of that property, and its profits since the expiration of the trust; and an application of both to the payment of the judgment; and an injunction against parting with them, so far as they might be liable to the judgment, and against setting up at law as a defence, (a matter which it was averred the defendant threatened,) that the debt had been discharged or affected; and that the validity of the judgment on the law side of the Court might be declared by this Court to be fully established: and the marshal's return to the *ca. sa.* regarded as an '*inexistence*,' so far as it might be used to violate the obligations of the original agreement of 8th April, 1830.

* 7 Peters, 348.

The bill was a good deal argumentative, under a form apparently narrative. It went back to, and coloured highly the circumstances of the marriage settlement, so far as Mr. Thomson was concerned with them. Reciting the original *ca. sa.* and the arrest of Mr. Thomson, it set forth that he must have either always remained in close confinement, or have obtained his discharge, by proceedings under the Pennsylvania acts for the relief of insolvent debtors; his proceedings under which, if successful, would have driven him to make a deed of assignment to his cre-

ditors, of all his *estate and property whatsoever, including the right of survivorship and reversion in the settled property upon his wife's death without issue,* and have conferred upon him, in return, only an immunity against liability to further bodily restraint or confinement for the non-payment of such of his debts, as were at the date of such proceedings in insolvency, due by him; and any petition for the benefit of which acts could have been filed by him, only after lying three months in custody and confinement under the said writ of *ca. sa.:* that thereupon the defendant, being so arrested at the suit of the complainants, it was agreed in writing between them and the defendant, that they should, *without prejudice to their rights and remedies against the said defendant, permit the said defendant forthwith to be enlarged from custody,* &c. The bill averred that by this agreement, &c., the defendant obtained no further advantage than that of "a present discharge from close custody, and a judgment that he had then no means of satisfying; the judgment, the said agreement and proceedings under it being a *substitute for proceedings in insolvency;* by which substitute, the said defendant, if he did not acquire the same extent of immunity which an insolvent discharge would have bestowed, at least obtained whatever immunity he did acquire by means less painful than an insolvency." It set forth the entire acquiescence of the complainants in the validity of the marriage settlement as adjudged on technical grounds merely, so far as Mr. Thomson was concerned: and that the said trial having resulted unfavourably to the complainants, they were content to abide thereby until the defendant, *if it should so turn out in the course of time,* acquired wherewithal to

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satisfy the judgment. And having patiently awaited the return of his solvency, and his ability to meet his obligations, and he having become once more restored in his circumstances, and a man of wealth, the complainants had recently called upon him to pay, in the expectation that, in consideration of the extreme hardship of their case, (in which the payment of a judgment arising out of a cash loan had been disappointed by a settlement of a debtor upon his wife, although insolvent when he made the settlement,) he would meet the call upon him, not according to the letter only of the agreement, but in the spirit of his own professions of obligation to the complainants for the same, and of their forbearance toward him in his adversity, when, to their astonishment, they were answered by him—not that he was *unable* to pay or that he would be even 'inconvenienced' by paying off the amount of the judgment, but—that inasmuch as according to law a party discharged by the plaintiffs' consent, after being taken on a *ca. sa.*, was released from the debt, even though he had pledged himself to his creditors not to plead such discharge,—he, the defendant, proposed to set up this said or supposed rule of law, and the said discharge for his protection against his own agreements and pledges, and against any further proceedings by the complainants under their judgment, and that he, the said defendant, then actually regarded and should to the Court insist that the said judgment,—his agreement to the contrary notwithstanding,—was cancelled, and *himself no debtor at all.*

The bill represented that the complainants were prevented from proceeding at law by the said rule of law so set up. The use of or any resort to which

they averred would be contrary to equity; because the defendant having pledged himself that he would *not* resort to the said rule of law,—by agreeing that the taking of the said defendant into and discharging him from custody should not prejudice the rights and remedies of the then plaintiffs,—it would be in direct fraud of his agreement, should he now resort to it, to the prejudice of those rights and remedies. And because the agreement that the defendant should be discharged from custody, was obtained by means, which were inequitable and fraudulent, namely, by a stipulation on the defendant's part—now offered to be violated by him—that the discharge should be without prejudice to the complainants; which means were further inequitable and fraudulent, in this, that the consideration for the discharge was illusory, fraudulent and unreal; and was a stipulation, that the discharge should be without prejudice to the complainant; a stipulation which the defendant could keep or break at his pleasure, and which supposed *consideration* for the discharge—namely, that the same should be *without prejudice*,—was not a consideration sufficient to support the said agreement for the discharge. And because the said mutual contract that the defendant should be discharged from custody, but withal, that such discharge should not prejudice the complainants' rights or remedies, was either a contract entered into by the common error of both parties in this, that they both erred in supposing that the contract could be carried into effect, when, in fact, it could not be, (of which said common error the defendant now sought to take advantage,) or it was a contract entered into, the complainants alone being in error, in supposing that the contract

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could be carried into effect, when, in fact, it could not be, the *defendant*, at the same time well knowing, and fraudulently availing himself of the error, and entering into the contract for the purpose, and with the fraudulent intent of taking advantage of the error, and intending that *he* should, by the contract, obtain all the benefit and advantage of a discharge from the *ca. sa.*, and that the complainants should not obtain the benefit of the corresponding stipulation, that the discharge should be without prejudice to their rights and remedies, of which fraud the defendant now sought to take advantage. The complainants then averred that when they accepted the stipulation at the hands of the defendant, that the discharge should be without prejudice to them, they did actually and firmly believe that it was capable of being enforced at law, as well as in equity, according to its terms, and were wholly unaware that the defendant could or would use, or resort to any rule of law whatever, whereby to escape its force and effect.

They set forth that the marriage settlement having been made to secure the property to the wife and children; and on the wife's death childless, to pass it in gross to the husband, had now done its office, and could go no further, and that it would be inequitable that the issue formed under the agreement, and in the framing and on the trial of which, it was assumed by the Court, and admitted by the defendant, that the settled estate was liable to the judgment, but for the protection afforded by the settlement, should be construed to have for its effect and consequence, that which was not contemplated by the parties, and was not sanctioned by the Court, and which, in itself, was wholly contrary to justice, namely, the discharging

from just liability the estate which, in consequence of the defendant's reversion and survivorship, had now come back to him, as completely as he ever did or could own it or any other property.

To this bill, the defendant now *demurred*, setting forth for cause, that "if the taking into custody, &c., under the *ca. sa.* was a legal discharge of the alleged debt, the complainants are not relievable in equity from the effect thereof for or by reason of any act matter or anything alleged in the bill; and if the said taking into custody was not such a legal discharge, then the complainants have full, adequate and complete relief at law." And the case was accordingly heard on the bill and demurrer.

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Mr. *Charles Ingersoll* in support of the bill.

I. *Construction of the Agreement of 8th of April*, 1830. If this paper meant less than the plaintiff insists, its last sentence beginning "it being expressly acknowledged," would have been omitted altogether. That sentence is not merely without purpose or sense, but is directly in the teeth of the meaning of the parties to the contract, if not intended to bind the defendant by a promise to stand by the judgment after the discharge as much as before. The words "or otherwise howsoever" in the case of extremely formal papers, in which the meaning of the parties is expressed at great length, might perhaps have little force, but in a brief stipulation such as this, drawn up in haste probably, and in order to an immediate and pressing object, they ought to have their full force and popular construction. They should be interpreted to signify that if by the words which precede them the

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plaintiffs' interests under the judgment are not fully guarded, the defendant shall give them protection "otherwise howsoever." They amount to a covenant for further assurance. The agreement interpreted in any other way leads to the absurd conclusion that the plaintiff perilled his whole debt without a motive, while the defendant obtained his enlargement from custody, giving no equivalent whatever therefor.

If the plaintiff had refused all arrangement, and simply permitted the defendant to remain in custody, he would have resorted to the insolvent law of Pennsylvania, or of the United States. In the former case there would have been a trial of the question whether the defendant was possessed of property more advantageous to the plaintiff than the trial in the Federal Court. In the latter case, of an application by the defendant under the United States insolvent law of 1800, the plaintiff, had he succeeded in breaking the trust, would have got the whole trust property, and whether he failed or succeeded would have had security of the most binding sort, in the custody of the defendant's person. The plaintiff therefore *gained* nothing by the agreement, for it is not pretended on the other side that he got anything by it, if he did not get security of a superior character for his debt, or a better trial of the question upon which it turned. He simply, as expressed by the agreement, set the defendant at liberty at the *defendant's instance*. He did an act of kindness, upon the defendant's agreement that it should be without prejudice. The defendant, on the other hand, acquired *first* his immediate liberty, which he could get only by agreement; and *second*, a trial of the

question of property in the Federal Court; a better trial for him than one in the Common Pleas, and much better than under the insolvent law of 1800, because that would have detained him in custody during the time the cause was pending which, as appears by the statement, was about three years. To give any other interpretation to the agreement would be to stultify the plaintiff, who dealt with the defendant liberally enough, but did not go the length of giving away his debt.

Assuming then our construction of the agreement to be the true one, the next question is,

II. *Whether the case is one for equitable relief?* The principles and cases found under the equitable heads of fraud and mistake, are applicable to the facts before the court.

1. *Fraud.*—If it were a case of mere breach of contract, it would not be cognizable in equity. Nor if it were a case of fraudulent breach of contract, and not more, for even fraud is cognizable at law unless there be in the case something to oust the jurisdiction. But here is a case where there can be no relief at law, because (we assume for the sake of argument) the courts of law have declared that a judgment is paid when the defendant is taken under a *ca. sa.*, and that even the defendant's own agreement to the contrary shall not change the rule; that a defendant's conduct in entering into such an agreement and then violating it, is "very scandalous," as the courts have termed it,* but that there is no remedy at law. The fraud is palpable. The defendant is in custody. He says to the plaintiff, the rule of law is that if you discharge me, the judgment is satisfied; but I pledge myself that as between you and

* Per Grose, J. Blackburn v. Stupart, 2 East, 243.

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me there shall be no such rule, and that if you will let me go, your judgment shall stand exactly as it did before your *ca. sa.* was issued. This agreement, the defendant, having had the benefit of it, utterly violates. He declares the judgment to be good for nothing, and the agreement good for nothing, and when the plaintiff takes proceedings at law he sets them at defiance. That is, having trepanned the plaintiff into the bargain by means of a promise that he will not exact the penalty of the position, he turns round and insists upon it. The plaintiff then comes into equity. This case is like that of a man who, holding a note five years and eleven months old, is told by the drawer to wait six weeks longer before he sues, and that the note shall be as good at six years old as it was before, and then being refused payment, and having gone into court, the defendant pleads the statute of limitation against him:—Like that of a plaintiff in a judgment who enters satisfaction in order that the defendant may be able to make title to a certain portion of the real estate bound by the judgment, the defendant having agreed in writing that the satisfaction should be cancelled, and the lien of the judgment restored as to the rest of his real estate, immediately after his sale was effected, and then is told by the defendant, your judgment is gone, and you will never get another:—Like that of one who, having given his receipt in full, but without value, to a debtor, in order that he might settle with a third person, is turned upon by the debtor and told that his debt is paid, and here is the receipt for it:—Like that of an obligee who, having released one of two co-obligors for the mutual purposes of obligee and obligors, and with

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the agreement that the discharge should be without prejudice as to the remaining obligor, is informed by him, after the object of the discharge has been accomplished and the advantages from it attained, that he does not mean to hold himself liable after the release of his co-obligor.

These are cases not distinguishable from that before the Court, and they are obviously for relief in equity. They are all cases in which a party has gained a fraudulent advantage of another, which not being relievable at law, will be relieved in equity, unless something can be shown to the contrary.

It will be pretended by the defendant that to relieve under this agreement of 8th April, 1830, would be to run counter to that *policy* which, favouring liberty of the person, has refused to permit a second *ca. sa.* for the same debt. To this the answers are:

a. There are two cases to the point that this rule concerning the liberty of the person, yields before proof of the defendant's fraud, in procuring his discharge.*

*Baker v. Ridgway, 2 Bingham, 41, S. C. 9 Moore, 114; and Holbrook v. Champlin, 1 Hoffman's Chancery Reports, 148.

b. On principle it would be strange indeed if that policy of law and equity and of all society which sets its face against fraud should give way before the so-called policy here invoked, which amounts to nothing at all since arrest for debt has been abolished, and which never did amount to more than a train of unfortunate decisions, which if they could be recalled, would never be made again.

2. *Mistake.*—It is averred in the bill as follows: "And your orators aver that when they accepted the said stipulation at the hands of the said defendant, namely, that the said discharge from custody of the said defendant should be without prejudice to your

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orators, they did actually and firmly believe that the said stipulation was capable of being enforced by your orators at law as well in equity, according to the terms of the said agreement, and were wholly unaware that the said defendant could or would use or resort to any rule of law whatever whereby to escape the force and effect of the said stipulation so contained in the said agreement." The plaintiff here avers that he mistook the law, and that the defendant availed himself of his mistake to get a discharge from custody, which, if the construction of the agreement above submitted be the true one, he obtained at the expense to the plaintiff of his entire debt, for which he received under the agreement no manner of consideration or compensation. The general rule is admitted, that a mistake of law affords no ground of relief. But when the mistake of one party is so great, and is so grossly taken advantage of by the other, that the bargain becomes not *do ut des* but *do ut non des*, not money paid or a thing done for a consideration but money paid or a thing done for less than nothing, the precedents are that relief will be granted without distinction between ignorance of law and ignorance of fact.*

* Champlin v. Laytin, 1 Edwards's Chancery Reports, 472.

The rule *ignorantia legis neminem excusat* pushed to extremes would cover fraud, and the averment of the bill here is in truth averment of fraud. To avail one's self of the ignorance of the other party of the law may be fair, or it may be fraudulent. If the grantor understand the covenant of warranty contained in his deed, and the grantee do not, the grantee cannot therefore come into Equity and be relieved from the effects of such ignorance. But if the grantor be aware that by law he has no title to the estate

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which he conveys and the grantee in paying his money for it receives only so much moonshine, the grantee is relievable; for the grantor defrauds him if he pushes his advantage over him to such lengths, though that advantage be but in knowing the law when the other does not. And if here the plaintiff in his ignorance of the law just gave away his debt and the defendant got a receipt in full for nothing; if the plaintiff sold his judgment of $22,000 for a right which was no right, then the defendant has overreached him, he has availed himself of the plaintiff's mistake of law with a vengeance. It is a case of fraud and Equity will make him whole. The cases on this head are numerous and go very far.*

It is not necessary, to entitle the plaintiffs to come into equity with this bill, that they should be absolutely without relief at law. Equity has jurisdiction when relief at law is doubtful or difficult.† "It is not of course to be taken as an answer to a bill praying relief, that the matter might be taken advantage of at law."‡ The averment of the bill is, that plaintiffs are *prevented* from proceeding at law.

III. *How stands the question at law?* The defendant contends that issuing and executing a writ of *ca. sa.* at law, discharges the debt at law, and satisfies the judgment, and this although the defendant expressly agrees that it shall not have such effect. The plaintiffs submit the rule on this subject to be, that *issuing and executing an execution* PRESUMES *a satisfaction.* To this extent, and no further, has the

*Landsdown v. Landsdown, Mosely, 364; Bingham v. Bingham, 1 Vesey, Sr. 126; Pusey v. Desbouvrie, 3 Peere Williams, 315-321; Evans v. Llewellyn, 2 Brown's Chancery Reports, 150; Fairwell v. Cocker, cited in Cholmondely v. Clinton, 2 Merivale, 352; Cann v. Cann, 1 Peere Williams, 727; Acton v. Pierce, 2 Vernon, 480; Cannell v. Buckle, 2 Peere Williams, 243; Naylor v. Winch, 1 Simons & Stewart, 564; Hunt v. Rousmaniere, 1 Peters, 1; Lowndes v. Chisholm, 2 McCord's Chancery, 463; Lammot v. Bowy, 6 Harris & Johnson, 500; Evart v. Strode, 11 Ohio, 481; Drew v. Clark, Cook, 374-380.

† Weymouth v. Boyer, 1 Ves. Jr. 424; Bynum v. Sledge, 1 Stewart & Porter, 138; Ludlow v. Simond, 2 Caines's Cases in Error, 39; Livingston v. Livingston, 4 Johnson's Chancery Reports, 287.

‡ Campbell v. French, 2 Cox, 367.

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law gone in regard to any kind of execution; and a careful examination will show that it has never fairly gone further in this regard as to a *ca. sa.* than as to any other writ of execution, and that the two English cases (and certain New York cases which were decided on their authority) were hastily decided, and without support from principle, reason or authority.

It was originally questioned whether a judgment could have more than one execution, and it was held accordingly, that any writ of execution being once issued, the judgment was *functus*. But the rule was after established otherwise, that is, that no execution issued is a satisfaction, or prevents an *alias*, unless satisfaction appear by the return. See the old cases quoted by Lord Hobart, in *Foster* v. *Jackson*.* No rule of law can be established so inimical to liberty or so severe upon debtors, as that which would say, that the creditor shall in no way deal with his debtor for his liberation from imprisonment, without discharging the debt and satisfying the judgment.† A *fi. fa.* executed presumes a satisfaction; there can no other execution be issued till by the return of the first it be shown that there has not been satisfaction.‡ A *ca. sa.* executed does no more, it presumes a satisfaction.

* Hobart, 57.

† See Jackson v. Knight, 4 Watts & Sergeant, 412.

‡ Slie v. Finch, 2 Rolle, 57; Miller v. Parnell, 6 Taunton, 370.

Many cases, both English and American, may be found, and will be cited by the defendant, where it has been said, and some where it has been held, that "*plaintiff receives a satisfaction in law by having his debtor in execution.*" Hobart, C. J. reasons himself to this in *Foster* v. *Jackson*, already cited. This is said in many other cases.|| If this be true, or if there be such a principle in the law, then it is a reason, and a sufficient reason, why the plaintiff may

|| Tanner v. Hague, 7 Term, 420; Ransom v. Keyes, 9 Cowen, 138; Crary v. Turner, 6 Johnson, 51; Yates v. Rensselaer, 5 Id. 364; Little v. The Bank, 14 Massachusetts, 443; Freeman v. Ruston, 4 Dallas, 214.

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not by any agreement with the defendant, relieve him from imprisonment, and yet preserve the debt and to the judgment its efficacy at law. If this reason be not sound, or if there is no such principle in the law, then no other reason can be given, and none other is in any of the cases given, why the law should not regard and protect such agreement, or why the law should assume for itself the anomalous and discreditable position into which Grose, J. puts it in *Blackburn* v. *Stupart*,* where he says that though the conduct of the defendant may have been "very scandalous," there is for the plaintiff no relief.

* 2 East, 243.

That there is any such principle or rule in English law, as that plaintiff receives satisfaction by having his debtor in execution, is contradicted by Lord Coke, in *Blumfield's case*.†(A)

† 5 Reports, 86.(A)

By all the decisions holding that if the defendant after escape, the judgment is good;‡ for if the judgment is *functus* by executing the writ, nothing after can restore it. By the decisions holding that executing a *ca. sa.* on a privileged person, who is after discharged, does not make void the judgment.§ By the statute of 21 James I., that if defendant die in execution, the judgment shall be still effective. By the decisions that an after insolvent's discharge, leaves the judgment effective.‖ By the cases holding that the new writ is in no case void, but voidable, only on cause shown.¶

‡ Basset v. Salter, 2 Modern, 136.

§ Merchant v. Frankis, 2 Gale & Davison, 473.

‖ Nadin v. Battie, 5 East, 147.

¶ 1 Scott, 404.

The class of English cases, where it was held that a plaintiff having a judgment against several defendants, could not release one from execution, without

(A) Lord Coke says expressly, "The execution of the body is no satisfaction, ... but a gage for the debt:" and he calls on his readers to note "good differences between execution *not* valuable, as of the *body* of the defendant, and execution valuable, as of *Lands*," &c.

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entirely losing his debt as to the others, is easily intelligible, and is the law of *fi. fa.* as well as *ca. sa.*, and is even the law of original liability, for there is no way by which one of several partners can be discharged from an original liability without discharging the others. And this principle explains various cases.* So, too, the class of cases where the plaintiff took, in satisfaction of his judgment, a new agreement, and it was held that his judgment was gone, and he must resort to suit on his new agreement, are clear in principle and reason.†

*Dentonv.Godfrey, 11 Jurist, 800; Herring v. Dorrell, 4 Id. 800; Ballam v. Price, 2 Moore, 235.

† Jaques v. Withy, 1 Term, 557; Birch v. Sharland, Id. 715; Vigers v. Aldrich, 4 Burrow, 2482; Goodman v. Chase, 1 Barnewall & Alderson, 297; Da Costa v. Davis, 1 Bosanquet & Puller, 242.

The only two English cases going the length that defendant asks in this case, and holding the judgment satisfied, and that plaintiff can have no further remedy in his then suit, whatever defendant's agreement may have been, are *Clark* v. *Clement*, in 6 Term,‡ and *Blackburn* v. *Stupart*, in 2 East.§ In *Thompson* v. *Bristow*, reported by Barnes,‖ the report is in a line, and the question seems to have been one of continuance on the roll. The reporter, at best, is not the most satisfactory.

‡ P. 525.
§ P. 243.
‖ P. 205.

The two former cases drive the law to the position assumed for it by Grose, J. in *Blackburn* v. *Stupart*, that however "scandalous" the conduct of the defendant may have been, the law can give the plaintiff no relief against his fraud. Their authority is much shaken, and in some cases contradicted, by later English decisions: as in *Baker* v. *Ridgway*,¶ which was the case of voluntary discharge by plaintiff from arrest, and is authority for the position that if plaintiff were induced to the discharge by the defendant's fraud, it shall not avail him, but the judgment shall be held effective. In *Atkinson* v. *Baynton*,** Sergeant Wilde in argument, doubts the sound-

¶ 9 Moore, 114; S. C. 2 Bingham, 41.

** 1 Scott, 404.

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ness of the principle established by *Blackburn* v. *Stupart* and *Clement* v. *Clarke;* and Tindal, C. J. plainly thought with him. Parke, J. says, that in *Jaques* v. *Withy*, Ashurst, J. spoke too broadly, and that Buller disagreed; and quotes *Baker* v. *Ridgway*, that if there were fraud in defendant's procurement of discharge, he may be re-arrested.

The law of *ca. sa.* in this regard, is refused to be extended to cases of attachment for not complying with award, and Holroyd, J. says, "Indeed those cases (meaning *Clarke* v. *Clement* and *Blackburn* v. *Stupart*) were considered so strong that the legislature interposed.*

*Good v. Wilks, 6 Maule & Selwyn, 413.

But be the English law what it may, the Pennsylvania Courts hold as we ask this Court to hold. In *Sharpe* v. *Speckenagle,*† it was held by the Supreme Court of Pennsylvania on general principles, that a discharge under an insolvent act, of one arrested on a *ca. sa.*, did not discharge his surety for stay of execution. Chief Justice Tilghman says: "I take the law to stand thus: If the plaintiff takes the body of the defendant in execution, he can never have against him *while in jail*, any other execution; but if he dies in jail, he may have execution against his lands or goods, by virtue of the statute 21 Jac. I. c. 24. I think, too, that in case of death, the better opinion is, that the plaintiff might have had execution against the defendant's lands or goods at *common law*. The statute 21 Jac. recites, that it had been *greatly doubted*, &c. It certainly had been doubted, although the decision reported in *Blumfield's case*‡ was expressly in favour of the execution, *and for reasons not easily answered:* because the plaintiff having secured his legal remedy, was in no default,

† 3 Sergeant & Rawle, 464.

‡ 5 Reports, 86.

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and therefore ought not to be injured by the act of God, which works wrong to no man: and it would be most unjust, if in such case, the goods of the defendant should not be liable, &c. In the case of *Foster* v. *Jackson*,* decided in the reign of James I., the law was indeed held contrary to *Blumfield's case, but in my opinion*, for reasons more technical and artificial, *but less substantial and satisfactory*. In that case, however, although, &c. . . . . yet it was laid down, that the taking on the *ca. sa.*, 'was not the perfect satisfaction in nature to all purposes, and against all persons.' On the contrary, 'that it was clearly no satisfaction, so as to bar the plaintiff to seek satisfaction against another for the same debt.' This principle the Court held 'decisive' of the case before them, as the discharge 'was effected by the act of law which, like the act of God, injures no man." There was, indeed, in the Pennsylvania act an express provision, that no other person should be acquitted by the principal debtor's discharge, which the Court say they could call in aid, if necessary; but it is not called in aid, the case being decided on common law principles. The case of *Jackson* v. *Knight*,† in the same Court, is much stronger and *absolutely in point*. By agreement in writing, endorsed on the writ, and *signed by the counsel*, the defendant's body was to be released 'without prejudice to his future liability for the debt and interest of the judgment, *which is to remain in full force and unimpaired.*' The Court held that the agreement prevented a discharge of the judgment against him, which remained a lien on his lands, and so encumbered them as to make an encumbered and unmarketable title. And the Court manifestly approves of the charge of the Court be-

* Hobart, 52.

† 4 Watts & Sergeant, 412.

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low, that "*such* a discharge is for the benefit of the defendant: it comports with humanity, justice and common sense:" and of the position that the principle which the defendant here seeks to maintain, "has been carried to an unreasonable and oppressive length, and often to the great injury of unfortunate debtors;" and that no case precisely like the one before them, had been shown."

Reverting to the language of C. J. Tilghman, who says, that neither the act of the law, nor the act of God, ought to work an injury to the plaintiff, we ask, where shall the act of the defendant himself—or the act of the plaintiff, done for his benefit and at his request,—which is tantamount to the act of the defendant himself—work any injury either?

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Mr. *J. M. Read*, Mr. *Cadwalader* and Mr. *W. A. Jackson*, in support of the demurrer. The thorough view which we propose to take of this case at law, will very much settle the question of equitable aid; for it will show how pervading the rule at law is. The creditor, by issuing a *ca. sa.*, chooses the body of the debtor in preference to his lands or goods, as the source of his satisfaction. By making an arrest, he secures to himself the satisfaction he has chosen, and is thereby estopped from resorting to any other mode of execution. As long as he holds the body, he is in the possession of a continuing satisfaction, and when, with his consent, the body is released, he confesses that his satisfaction is complete; and if the release is accompanied by any agreement with the debtor, or third parties acting for him, such agreement (whatever may be its terms) is a new and ori-

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ginal contract, which can in no way, affect the completeness of the satisfaction previously received. This is the English law.

From a series of decisions upon these points, covering four centuries, only a single case* can be cited in conflict with the rule thus stated The statement of facts in *Blumfield's case* by Lord Coke is this: "Two men were bound jointly and severally in a bond, one was sued, condemned, and taken in execution, and afterwards the other was sued, condemned, and taken in execution, and afterwards the first escaped and thereupon the other brought *audita querela*." Judgment was given against the payer. The decision is law, and in harmony with the principles above laid down. Lord Coke, however, in his annotation cites the case of *Jones and Williams* (elsewhere unreported), "where two men were condemned in debt, and one was taken and died in execution, yet the taking of the other was lawful." This case may also be law, but makes nothing against the present appellee. Lord Coke proceeds, "and then" (in *Jones and Williams*) "it was resolved by the whole Court that if the defendant in debt dies in execution, the plaintiff may have a new execution by *elegit* or *fi. fa.* for divers reasons," which he goes on to enumerate. It is for this passage that the case has been often heretofore and is now cited, the value of the authority being merely this: that Lord Coke in reporting a principal case, which is entirely with us, refers to an unreported case which is also with us, but in which there is a *dictum* against us of which he appears to approve. But whatever may have been its original authority, this *dictum* has been repeatedly declared not to be law. *Blumfield's case* was argued in 39 Eliz., and

* Blumfield's Case, 5 Reports, 87 (1596).

published in 3 James, and must consequently have been well known in 4 James, when the case of *Williams* v. *Cutteris*,* also cited as *Cutter* v. *Lamb*, was decided. Yet in the last-mentioned case the defendant having died in execution, the Court held that the plaintiff had no further remedy. In *Foster* v. *Jackson*,† where the same point arose, C. J. Hobart makes the same decision, and in the course of an elaborate opinion approves the cases of *Blumfield*, and *Jones and Williams*, but condemns the *dictum* which accompanies them. Since then, in Sir *Edward Coke's case*,‡ and in *Cave* v. *Fleetwood*,§ it was pronounced "not to be law," and in *Taylor* v. *Waters*,‖ where a similar point arose and counsel urged its authority, it was wholly disregarded by the Court. From that time up to the present, though similar questions have frequently arisen, it is believed that this citation has never been offered to the consideration of an English tribunal.

* Croke Jac. 136. (1607.)

† Hobart, 52, 57. (1613).

‡ Godbolt, 294. (1624.)

§ Littleton, 325. (1630.)

‖ 5 Maule & Selwyn, 103. (1816.)

Having disposed of this *dictum*, we will proceed to examine, first, those cases in which it has been held that the release of a debtor in execution by the plaintiff's consent, is a satisfaction of the judgment and execution, and also an extinguishment of the debt.

In *Whiteacres* v. *Hamkinson*,¶ one of two co-obligors pleaded that the other, being in custody in a suit upon the same bond, the sheriff permitted him to go at large, and upon demurrer, it was adjudged for the plaintiff; but, say the Court, "if he had pleaded that the sheriff suffered him to go at large by the license or command of the plaintiff, it had been a discharge, and might have been pleaded in bar."

¶ Croke Car. 75. (1627.)

In *Walker* v. *Alder*,** the plaintiff consented to an interview with the defendant beyond the prison

** Styles, 117. (1649.)

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bounds, but having failed to come to an agreement, recommitted him. The Court held that "the execution was discharged by the prisoner's going at large."

In *Price* v. *Goodrick*,* C. J. Rolle held, that in a judgment against three, if one be taken and discharged with plaintiff's consent, the other two cannot be taken upon the same judgment.

* Styles, 387. (1653.)

In *Basset* v. *Salter*,† the decision in *Walker* v. *Alder* first above cited, is affirmed, and the Court say, "He (the defendant), could never after be in execution at his suit for the same matter."

†2Modern, 136. (1677.)

In *Thompson* v. *Bristow*,‡ "the defendant was taken in execution, and was afterwards discharged by plaintiff's consent, and a written agreement was entered into by the parties, that the judgment should stand revived for twelve months. After more than a year from the last *ca. sa.*, plaintiff caused defendant to be again taken in execution, without continuance on the rolls, relying on the written agreement. *The Court held the agreement to be null and void, and made the rule absolute to set aside the last ca. sa., and discharge the defendant out of custody.*"

‡ Barnes's Notes, 205. (1743.)

In *Vigers* v. *Aldrich*,§ the defendant was released on binding himself to pay the debt by instalments. Upon default, an action of debt was brought upon the judgment. "The Court held this to be an *absolute* consent in the plaintiff to discharge the defendant out of execution, in consideration of a new agreement then entered into, whereby he was to receive several sums of *money*, instead of the *person* of the defendant (which was all that he could have had if he had kept the defendant in gaol,) and that he could not bring an action upon the judgment after the defendant had been taken in execution and dis-

§ 4 Burrow, 2482. (1773.)

charged by the plaintiff's own consent, but ought to have brought a new action upon the case founded upon this new agreement." Yates, J., added, that he could not declare on the old judgment since it was necessary to allege that "it remained altogether unsatisfied."

In the leading case of *Jaques* v. *Withey*,* defendant was released upon giving a bond with warrant of attorney for the debt. A technical error was committed in naming the Court where judgment was to be confessed. The original judgment was attempted to be used as a set-off in another suit. Ashurst, J., ... "I know of but one case where a debtor in execution, who obtains his liberty, may afterward be taken for the same debt, and that is where he has escaped; but the reason of that is, because he was not legally out of custody. But where a prisoner obtains his discharge with the consent of the party who put him in execution, he cannot be retaken." Buller, J., ... "The case of *Vigers* v. *Aldrich*† goes to the whole length of this. For it shows that if a defendant has been once discharged out of execution, upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again or charge the defendant's person in execution."

* 1 Term, 557. (1787.)

† 4 Burrow, 2482.

In *Da Costa* v. *Davis*,‡ a bond was given conditioned to surrender the defendant, who had been discharged by consent of plaintiff, or pay the debt. The Court held the first alternative of the bond was void, being to render a prisoner in execution who had once been discharged.

‡ 1 Bosanquet & Puller, 242. (1793.)

In *Clark* v. *Clement*,§ there was a judgment and *ca. sa.* against Clement and English. English was arrested and afterwards discharged upon agreement

§ 6 Term, 525. (1796.)

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with the plaintiff by which he bound himself to surrender, if the debt were not paid within a certain time. Clement then moved to quash the *ca. sa.* and enter satisfaction on the roll. Rule granted so far as to protect Clement from any arrest under the judgment. Upon non-payment, English being re-arrested, moved to quash the *ca. sa.* and enter satisfaction; citing the above cited cases of *Thompson* v. *Bristow*, *Vigers* v. *Aldrich*, *Jaques* v. *Withey*. Rule made absolute.

* 7 Term, 420. (1797.)

In *Tanner* v. *Hague*,* the defendant was released upon agreeing to pay the debt at a future day. On non-payment *fi. fa.* issued, which the Court set aside because "the plaintiff received a satisfaction in law by having his debtor once in custody on execution."

† 2 East. 243. (1802.)

In *Blackburn* v. *Stupart*,† the defendant was released upon agreeing to pay the debt at a future day or consent to execution issuing against his person or estate. Upon non-payment he was arrested, and paid the debt to procure his discharge. This was a rule to set aside the execution, and that the money in the sheriff's hands should be refunded. The Court made the rule absolute, and Grose, J., said, "a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not."

‡1 Barnewall & Alderson, 303. (1818.)

In *Goodman* v. *Chase*,‡ the defendant agreed to pay the debt and costs, provided his son then in execution for them should be discharged. The case turned upon the question, whether this promise of Chase, Sr., was within the Statute of Frauds. Lord Ellenborough, C. J.: "By the discharge of Chase, Jr., with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held sufficient.

Then if so, the promise by the defendant here is not a *collateral*, but an *original* promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase, Jr."

In the case of *Ballam* v. *Price*,* it was held to be "quite clear that the discharge of one operated as the release of both the defendants." And to the same effect is *Eales* v. *Fraser, et al.*†

In *Herring* v. *Dorrell*,‡ where two were in prison, and one was discharged by the plaintiff's consent, Coleridge, J., held that the other was entitled to his discharge as of course, and there was no consideration for a promise made by him in order to procure it.

In *Denton* v. *Godfrey*,§ the facts were similar to those in *Clark* v. *Clement*, and on application made, the same rule was made absolute as to the defendants not arrested.

This branch of the case may be satisfactorily summed up by a citation from the First Report of the Common Law Commissioners,‖ at the head of whom was the present Lord Chief Justice Jervis. After recommending that authority be given the plaintiff's attorney to consent to the discharge of a defendant in execution, they proceed to say,¶ "but as a discharge by the creditor's authority from custody on a writ of execution, *is a satisfaction of the debt*, we think the authority should only be binding, so far as the sheriff is concerned, leaving it to the parties to contest the right of the attorney to give the discharge." Such an incidental recognition of the law, coming from so high an authority, proves in the most conclusive way, how thoroughly it is established in England. It remains,

II. To examine into the effect of an arrest and

* 2 Moore, 235. (1818.)

† 6 Manning & Granger, p.755. (1843.)

‡ 4 Jurist, 800. (1840.)

§ 11 Id. 800. (1847.)

‖ Law Commissioners Report, p. 48. (1851.)

¶ 15 Law Magazine, p.132,133.

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imprisonment upon a *ca. sa.* generally; the position of the defendant being, that such an arrest and imprisonment, if regular, constitute a perfect satisfaction, so long as the imprisonment continues, and that the nature of the satisfaction can only be impaired by an interruption of the imprisonment through the tortious act of the defendant himself, or the operation of the law *in invitum*, as against the plaintiff.

Year Book 33 Hen. VI., p. 48. (1455.)

In Year Book, 33 Hen. VI., it is said by Davers, "Suppose a man recover against me and take my body in execution, he shall have neither *elegit* nor *fi. fa.*, nor any other execution, *because this amounts in law to satisfaction.*" So in 13 Hen. VII., it is said by Keble, "If on a *ca. sa.* the sheriff return *cepi corpus*, the plaintiff shall never have another *ca. sa.*, for he learns from the return of the sheriff that he was in execution, *and then he had the object of his suit.*"

Year Book 13 Hen. VII., p. 1. (1498.)

* Hobart, 52. (1613.)

The most carefully considered case on this whole subject is *Foster* v. *Jackson*,* where the defendant died in execution, and the plaintiff brought *scire facias* against his executors. After examining *Blumfield's case* and reviewing the whole subject at length, C. J. Hobart says, "But now singly out of the very point, I hold that a *capias ad satisfaciendum* is against that party as not only an execution, but a full satisfaction by force and act and judgment of law, so as against him he can have no other nor against his heirs or executors, for these make but one person at law." And in concluding he lays down the broad principle on which many of the decisions already referred to are based, especially those where an agreement to surrender has been held to be void, "that the body of a freeman cannot be made subject to dis-

tress or imprisonment by contract, but only by judgment."

The law as thus laid, governed all subsequent cases of death in execution until Parliament interfered, and by the statute of 21 Jac. I., c. 24, gave the creditor a further remedy against the estate of the deceased.

In *Burnaby's case** the plaintiffs having the defendant in execution, afterwards petitioned as creditors for a commission of bankruptcy, but the Lord Chancellor held, "that the body of the debtor being in execution, it was a satisfaction of the debt in point of law, so that they were not creditors who could petition."

* 1 Strange, 653. (1726.)

And in *Horn* v. *Horn*,† Lord Hardwicke, distinguishing between law and equity, says, "The body being detained is not in this Court a satisfaction; the reason is because he is detained for the contempt; but at law the detaining the body is a satisfaction, and you cannot afterwards take his goods."

† Ambler, 79. (1749.)

Taylor v. *Waters*,‡ was assumpsit by one in prison; a set-off was pleaded, and it was replied that the debt so pleaded, was the same for which the plaintiff was still in custody. Lord Ellenborough held that "the taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor, and in like manner precludes a set-off against him." Here the defendant being still in custody, the debt is not yet extinguished, but the plaintiff has no other remedy, since he is in the actual receipt of satisfaction, and has the means in his control of continuing that satisfaction till it becomes complete.

‡ 5 Maule & Selwyn, 103. (1806.]

In *Ex parte Knowell*,§ after a commission of bankruptcy issued, the plaintiffs committed defendant on *ca. sa.* The Chancellor refused to allow them to

§ 13 Vesey, 193. (1806.)

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prove under the commission, since their act "operated as a discharge." This is a peculiarly strong case because the arrest was made at the request of the assignees to compel the debtor to make certain conveyances.

* 3 Merivale, 224. (1817.)

In *Franklin* v. *Thomas*,* in consequence of delay in filing a bill for a common injunction to stay proceedings at law, the plaintiff at law was enabled by demurring to the bill to gain time enough to take the defendant (Franklin) in execution. The demurrer being subsequently overruled, Franklin demanded to be put in the same position he would have occupied, if there had been no demurrer. Lord Eldon says,† "It is true that when goods have been taken in execution, that may be easily set right. *But here the taking in execution is a discharge of the debt.*" And on a subsequent day he says,‡ "The order therefore to be made in this should be, that he shall be discharged on undertaking to again confess judgment, so that he may not afterwards say, the existing judgment and debt has been satisfied by the execution, from which he is now discharged." Accordingly, the order, which is reported at length,‖ was prepared with evident solicitude to avoid on the one hand any implication of a continuing liability upon the old judgment, which was discharged by the release, and on the other to secure to the plaintiff at law, a new and original contract of equal value, accompanied by a warrant of attorney authorizing the confession of a new judgment in the same amount as the former.

† Id. p. 233.

‡ Id. p. 234.

‖ Id. p. 235.

§ 20 Law Journal, Ch. 174; 15 Jurist, 49; 13 Beavan, 229; 1 Eng. Law & Equity Reports, 146. (1850.)

A similar question recently arose in the case of *Money* v. *Jordan*,§ and Lord Langdale relied on the case of *Franklin* v. *Thomas*, and directed the same order to be made.

In *Beaven* v. *Robins*,* a plaintiff who was in execution for the costs of a former suit, brought a second action for the same cause, and the Court refused to stay proceedings in the second until the costs of the first were paid. The imprisonment was sufficient.

* 8 Dowling & Ryland, 42. (1826.)

The above cases not only sustain the position to which they are cited, but they also prove that it is not merely a sharp point of law, adhered to out of respect for ancient authority, but that it has been treated at all times, both by the judges at law and by Chancellors, as a well-founded principle, to which a controlling force should be given in every case where it is either directly or collaterally involved. The original debt has uniformly and for all purposes for which it has ever been attempted to be used—whether as a set-off, the foundation of an assumpsit, or of a claim in bankruptcy—been held to be satisfied and the judgment to be valueless.

So far as the examination of the English law is concerned, it only remains,

III. To examine some particular cases, which are considered by the other side as exceptions to the general rule, but which in reality go far to illustrate and strengthen it.

1. *Cases of Escape.* By the oldest authorities† an escape was considered as effectual a discharge of the debt as a release, and *Blumfield's* case is the first decision to the contrary. The opposite doctrine was finally established in *Whiteacres* v. *Hamkinson*,‡ and the reason of it was given by Ashurst, J., in *Jaques* v. *Withey*,§ "I know of only one case where a debtor in execution who obtains his liberty may afterwards be taken again for the same debt, and that is where he has escaped; *and the reason of that is because he*

† Brooke Execution, pl. 79; Year Book, 33 Hen. VI. p. 47.

‡ Croke Car. 75. (1627.) Ante, p. 231.

§ 1 Term, 557. (1787.) Ante, p. 226.

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was not legally out of custody." The result of these cases then is, that where the prisoner has escaped of his own wrong, although the satisfaction which the plaintiff was receiving is temporarily interrupted *in fact*, yet in intendment of law the defendant is still in custody and may be retaken.

2. *Cases of rescue*, which depend upon the same principle as those of an escape.* The defendant was never, in contemplation of law, out of custody.

* Jaques v. Withy, and ante, p. 239; Lark's Case, (Anno 1430.) 1 Hatsell's Precedents, p. 17; Atwyll's Case, (Anno, 1478.) 1 Hatsell, p. 48; May's Practice of Parliament, p. 107; 1 Hatsell, p. 153 to p. 157; May's Practice of Parliament, p. 113, 114 (Anno, 1603.)

3. *Arrest of privileged defendants.* The arrest of a member of Parliament has from the earliest times been held irregular; and it was occasionally doubted whether such an arrest, followed, as it necessarily was, by a discharge, either upon writ of privilege or without it, did not operate like a release by consent, as a total discharge of the debt. Thus, in the celebrated case of *Sir Thomas Shirley*, Hatsell says, "It appears that the principal difficulty attending the release of Sir Thomas Shirley was the same that had occurred in the former cases of this nature, viz., 'That the warden would have been liable to an action of escape, and the creditor would have lost his right to an execution.' Nor was it in the power of the House of Commons alone to give any security upon either of these points; it therefore became necessary in this case, as in the instances of *Lark*, *Atwyll*, &c., to make a particular law 'to secure the debt of the creditor, and to save harmless the Warden of the Fleet,' and in order to avoid this difficulty for the future, it was thought expedient to pass the general law of the first of James I., ch. 13." This act, after reciting that "doubt hath been made, if any person being arrested in execution and by privilege of either of the houses of Parliament, set at liberty, whether the party at

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whose suit execution was pursued, was for ever after barred and disabled to sue forth a new writ of execution in that case," enacts; that after the expiration of the privilege, the party may sue out another writ of execution with the same effect as if the first had never issued.

The material question here is, to determine upon what grounds a second *ca. sa.* was in any case of privilege allowed to issue. In the case of *Cassidy* v. *Steuart*,* where the whole subject was examined with great research, the judges were all of opinion that the first *ca. sa.* was irregular and illegal. Bosanquet, J., says,—"The arrest, therefore, of a member of Parliament would clearly be an illegal act.† But if the thing ordered to be done be illegal, the order must also be illegal." In the earlier privilege case of *M^c Cormick* v. *Melton*,‡ Lord Lyndhurst, speaking of the effect of such a *ca. sa.* as between the parties, plaintiff and defendant, uses the strong language that "A writ set aside for irregularity is a nullity and void, and is no satisfaction of the judgment."§ And this is the generally received law as between the parties, although the apparent regularity of the writ may be a sufficient protection to the officer serving it.

* 2 Manning & Granger, 437. (1841.)

† P. 471.

‡ 1 Crompton, Meeson & Roscoe, 525; S. C. 5 Tyrwhitt, 147; 3 Dow. (House of Lords) 215. (1834.)

§ Collins v. Beaumont, 10 Adolphus & Ellis, 225; Towers v. Newton, 1 Id. New Series, 319; Barrack v. Newton, Id. 525; Merchant v. Frankis, 2 Gale & Davison, 473.

The case of privilege then as affecting the service of a *ca. sa.* is simply this: A plaintiff in possession of a valid judgment undertakes to enforce it by issuing an irregular and illegal execution, which, in the words of Lord Lyndhurst, is a mere nullity, and upon this writ the defendant is arrested, and of course discharged. It is evident that the first ingredient of satisfaction is wanting. The case is exactly the converse of an escape, for as in the one, the defendant, in the words of Ashurst, J., was never legally *out* of

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custody, so here he was never legally *in* custody. A good judgment cannot be satisfied, nor a valid debt extinguished, by serving an irregular, illegal, and void execution. This ruling is by no means peculiar to the case of privilege. As early as the case of *Sir William Fish and Wiseman*,* Dodderidge, J., stated the general principle in language quite as strong as Lord Lyndhurst's. "If the execution be lawful, and upon lawful process, and the party be delivered out of execution, then he shall not be taken again in execution. But if he be taken in execution upon an erroneous process, if he be delivered out, he may be taken again in execution; for the first execution is erroneous, and is no record, being reversed."

* Godbolt, 371. (1627.)

4. *Cases of discharge from imprisonment by the Lord's Act, &c.* The discharge in these cases has always been held to be the act of the law, and not to imply any consent on the part of the plaintiff. In compliance therefore with the old maxim, the courts have taken care that this act of law shall in no way injuriously affect the plaintiff's rights. Thus in *Nadin* v. *Battie et al.*,† where two were in prison, and one was discharged because of the plaintiff's refusal to pay the prison charges, Lord Ellenborough, on an application to discharge the other, decided that "the discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party in prison at his own expense. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent against the fact, as to operate as a discharge of the other."

† 5 East, 147. (1804.)

The same, as will be seen hereafter, has been the

ruling of the American courts, and for the same reasons here assigned.

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5. *Cases of debts payable by instalments.** Where the judgment is to be satisfied by instalments, and execution is to issue upon non-payment of any of the instalments, it is held that a release from imprisonment upon one instalment with the plaintiff's consent, will not affect the remedy or bar the execution upon a second instalment. This is expressly upon the ground that the two executions are not for the same debt. Such was the principle that governed the case of *Atkinson* v. *Bayntun*,† which has been relied upon as an authority against the appellee. The defendants were in execution on one instalment, and a third party agreed upon consideration of their release, to be responsible for their appearance, should they become liable to a second execution. Such second execution having issued and the defendants not appearing, this action was brought upon the agreement. It was contended that the agreement was void at law; but per Tindal, C. J., . . . "There is no statement here from which we can infer that the debtor was to be charged a second time, in respect of the same sum for which he had already been in custody. On the contrary, by pursuing the calculation suggested by the agreement, it appears that the second execution was for a sum and a subject-matter different from the original one." Park, J. "It was the duty of the defendant to make it clear that the second execution was for the same sum, as much as if there had been an actual recaption, and the defendant had come before the judge to be discharged on account of a second arrest. Not having done so, it appears to me clear that the plaintiff is entitled to

*Davis v. Gomperts, 2 Neville & Manning, 607. (1833.)

† 1 Bingham's New Cases, 444. (1835.)

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judgment." Vaughan, J. "It is clear that the second execution was not in respect of the same sum as the first." Bosanquet, J. "It was incumbent on the defendant, in order to raise any appearance of an answer to the plaintiff's claim, to show that the two sums were the same. Not having done that, and it being compatible with the whole of his statement that the sums should be different, our judgment must be for the plaintiff."

6. It may be proper, in this connexion, to notice the case of *Baker* v. *Ridgway*,* which has also been cited on the other side. The defendant was in custody under a *ca. sa.;* a commission of bankruptcy was issued against him; the plaintiffs were compelled, by the stat. 49 Geo. III. c. 121, to discharge him out of custody, before they could be admitted to prove their debt under the commission; the commission was afterwards superseded on the ground of irregularity; and the defendant was again arrested. Affidavits were submitted by the plaintiffs, and relied on by the Court, tending to prove that the irregularity by which the commission had been avoided, was the result of fraudulent collusion between the debtor and a portion of his creditors. This was a motion to discharge the defendant, and enter satisfaction upon the judgment. The rule was discharged. Such being the facts, it does not seem that the case differs materially from that of an escape. It was, in reality, an escape effected by an abuse of the forms of law, and the same may be said of it, as Ashurst, J., said of *Jaques* v. *Withy*,—"The defendant was never legally out of custody." At any rate, he was never discharged by the *consent of the plaintiff.* That these were the grounds of the Court's opinion, may be seen

* 2 Bingham, 41. 8. C. 9 Moore, 114.

from many of the remarks reported by Bingham—thus Best, C. J.,* "If this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a supersedeas out of the benefit sought by the proof of his debt, the defendant may be taken again, because the fraud *has avoided the whole transaction, and the defendant has never been legally out of custody.*" Burrough, J.,† "With a view to the privileges secured by that Act (Sir Samuel Romilly's), *a commission superseded, is equivalent to no commission.* The plaintiffs who proved, have been induced *by a force on their minds*, to discharge the defendant." Whatever may be thought, however, of the grounds upon which the rule was discharged, the value of the decision as an authority, is seriously weakened by the manner in which it was extorted from the Court. Best, C. J., himself says:‡ "However, I consider myself no more bound by a decision delivered in the present summary mode of treating the question, than I should be by an opinion delivered at *Nisi Prius.*"

* P. 46.

† P. 48.

‡ P. 46.

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From all the cases, then, we draw the conclusion that the *English* law is, and has been for more than four centuries, that the writ of *ca. sa.* is the highest sort of execution known; that it is capable of affording the plaintiff complete and absolute satisfaction, and that its execution will satisfy the judgment and extinguish the debt, unless this its regular legal effect be avoided by some after contingency. The only after contingencies, whether existing at common law or provided for by statute, which are allowed to have this effect, are an *escape* by the defendant's own wrong or effected by his actual fraud; a *rescue;* an avoidance of the writ for *irregularity;* an enlargement of

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the prisoner by act of *law;* or (since the 21 Jac. I.) his *death* in execution. Upon the happening of any of these contingencies, the plaintiff having been deprived, without his own default, of the complete satisfaction to which his writ entitled him, the law will supply him with other means of enforcing it.* If, however, after the execution of the writ, the plaintiff voluntarily consent to the discharge of the defendant from custody, while by such execution and discharge the judgment is satisfied and the debt extinguished at law, so the plaintiff's consent operates further as a confession of such satisfaction, and if properly presented to the Court, will be entered of record on the Roll. The policy of the law, moreover, prohibits the defendant from entering into any agreement by which the judgment or debt, upon which he is in custody, shall, for any purpose whatever, be made to survive his release, and pronounces all such agreements null and void. Nevertheless the discharge of the defendant shall be a good consideration for an original and independent contract, which, if afterwards violated, may be enforced by new proceedings. This last rule avoids the hardship to which creditors might otherwise, even against their inclination, be compelled to subject their imprisoned debtors, who are unable to liquidate their debt by actual payment, but can give satisfactory security in consideration of a discharge.

* Archbold's New Common Law Practice, p. 257. (Ed. 1853.) Sewell on Sheriff, p. 198.

We have next to ascertain whether the *American* Courts have adhered to the doctrines of the Common Law as expounded in England.

American Authorities.

The precise question as to the effect of the voluntary discharge of the debtor from custody, has, it is believed, never been decided by this Court. But in two cases, the nature of the writ of *ca. sa.* has been

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Federal Courts.

incidentally discussed in the Supreme Court of the United States, so far as it bore collaterally upon points then before it. It was only necessary, therefore, to enter into this subject, and to press the conclusions far enough to meet the particular question presented. Thus, in *The United States* v. *Stansbury*,* the question before C. J. Marshall was, whether the rights of a particular debtor were to be governed by the Common Law or by an Act of Congress. Having decided in favour of the latter position, he waives all argument upon the Common Law, and introduces his opinion by stating it in a form that was unquestioned on either side: "It is not denied, that at Common Law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is therefore the legal consequence of the voluntary discharge of the person by the creditor."

* 1 Peters, 573. (1828.)

So, in the late case of *Snead* v. *M'Coull*,† the question was, whether a creditor's lien upon the lands of his debtor could survive the execution of a *ca. sa.* upon his person. Judge Daniel, delivering the opinion of the Court, after showing that no lien on lands can be of superior binding force to that of an elegit, the capacity to issue which never survives a fully executed *ca. sa.*, incidentally alludes to the nature of this latter writ, and the effect of a plaintiff's voluntarily releasing a defendant who is in custody under

† 12 Howard, 407. (1851.)

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it. In so doing, he cites at length the strong language of the Lord Chancellor in *Ex parte Knowell*, and refers to the leading English cases of *Vigers* v. *Aldrich*, *Tanner* v. *Hague*, and *Blackburn* v. *Stupart*, already cited by us.*

* Ante, pp. 232, 234.

† 4 Cranch's Circuit Court, 271. (1833.)

But, in *The United States* v. *Watkins*,† the subject was fairly brought before the Circuit Court of the United States for the District of Columbia, and C. J. Cranch, in an opinion, in which almost every English authority is examined, sustains all the positions taken by us as to the English law, and recognises them as forming part of the law of Maryland, and therefore binding in the District of Columbia.

MARYLAND.

‡ 4 Gill, 29. (1846.)

Since this decision, the case of *Harden* v. *Campbell*,‡ has been adjudicated in Maryland, and C. J. Martin sustains the conclusions arrived at by C. J. Cranch.

VIRGINIA.

The case of *Snead* v. *M'Coull*, in Howard, was decided upon the law of Virginia, and the authorities of that State will be found peculiarly strong. Thus, in *Windrum* v. *Parker*,§ Carr, J., says,‖ "That the levy on a *ca. sa.*, and the release of the debtor from execution by the plaintiff or his agent, *is an extinguishment of the debt*, I have considered to be as well settled as any point can be, by an unbroken series of decisions." And in *Noyes* v. *Cooper*,¶ Brockenbrough, J., says: "It has undoubtedly been established by a series of decisions, that where a defendant in execution under a *ca. sa.*, has been discharged from his imprisonment by the direction or with the consent of the plaintiff, no action will ever again lie on the judgment, on which the execution is founded. Nor can any new execution ever issue on that judgment, even though the defendant was discharged on an ex-

§ 2 Leigh, 361. (1832.)

‖ P. 367.

¶ 5 Leigh, 186. (1834.)

press understanding on his part, that he should be liable again to be taken in execution, on his failure to comply with the terms on which the discharge took place."

In Massachusetts,* C. J. Parsons, in the early case of *Forster* v. *Fuller*, decided that a plaintiff who discharges his prisoner, "has no remedy on his judgment." So in *King* v. *Goodwin*,† the Court were all of opinion, "That the debtor being committed to prison in execution, and liberated therefrom by the creditor, the judgment was satisfied, and a *pluries* execution upon which the levy on the land was made, was void." The same doctrine is affirmed in general terms in *Dodge* v. *Doane*;‡ and in the last case§ upon this subject, the Supreme Judicial Court of Massachusetts, through that sound and discriminating judge and writer, Metcalf, C. J., use the following language:—"But a commitment in execution is a discharge of the judgment, when the creditor consents to the debtor being released from prison, though the consent be given on terms that are not afterwards complied with; or upon the debtor's giving new security, which afterwards proves to be worthless; or, though the release from imprisonment be upon the debtor's express agreement that he shall be liable to be taken again on execution, if he fail to fulfil the terms on which he is released. In none of these cases can the creditor (unless circumvented by fraud) maintain an action on the judgment, or lawfully take out a new execution. Nor can he set off the judgment in an action maintained against him by the debtor."

MASSACHUSETTS.

* 6 Massachusetts, 58. (1809.)

† 16 Id. 63. (1819.)

‡ 3 Cushing, 463. (1849.)

§ Coburn v. Palmer, 15 Law Reporter, 629. (1853.)

In Vermont the law was early established in the case of *Bailey* v. *Kimbal*,‖ where one of two prisoners

VERMONT.

‖ 1 Chipman, 151. (1813.)

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was released by consent, and the other escaped. Judge Hubbard states the rule very forcibly, "Where a debtor in prison is discharged from his imprisonment by the creditor, he cannot be retaken; it is a discharge of the debt itself. It is therefore immaterial to determine whether the escape of Jesse happened before or after the discharge of Stephen. The discharge of Stephen from his imprisonment being a discharge of the debt, must be good for him, and being so, it must be a discharge of all the defendants."

Rhode Island. * 1 Rhode Island Rep. 143. (1840.)

The same is the law in Rhode Island as is shown by *M'Crillis* v. *Sisson*.*

New York. † 5 Johnson, 364. (1810.)

In New York the law has always been perfectly clear. In the early case of *Yates* v. *Van Rensselaer*,† the plaintiff agreed to enlarge the jail bounds, and afterwards the defendant escaped. The Court held that the agreement was in effect a release from custody and the defendant could not be retaken. So in

‡ 1 Cowen, 56. (1823.)

Cooper v. *Bigalow*,‡ where the defendant was discharged by consent, and the plaintiff attempted to use the judgment as a set-off. But the Court held, that "the bodies of the defendants being in execution, this is in judgment of law, a satisfaction of the debt." And in *Lathrop* v. *Briggs* and *Ransom* v.

§ 8 Id. 171; 9 Id. 128. (1828.)

Keyes,§ Judge Woodworth decides, in the clearest terms, that the release by the plaintiff's consent, either of the only defendant, or of one of several, is a discharge both of the judgment and the debt.

New Jersey.

The law is the same in New Jersey, as shown by the cases of *Miller* v. *Miller*, *Strong* v. *Linn*, and *Allen*

‖ 2 Southard, 508. (1819); 2 Id. 799. (1820); 2 Green, 102. (1833.)

v. *Craig*.‖ In the latest of these cases, the Court, where one of two defendants had been discharged with the plaintiff's consent, ordered the other to be

discharged on motion, and satisfaction to be entered on the record, on condition that the said defendant would stipulate to bring no action on account of his imprisonment.

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Ohio.

So, in *Bowrell* v. *Zigler*,* the latest Ohio case on the subject, and which, under similar circumstances, was decided upon the same principle as the English case of *Nadin* v. *Battie*, C. J. Hitchcock says—"We suppose where a creditor causes his debtor to be imprisoned on execution, while the imprisonment continues it is a satisfaction. Or if the debtor is discharged with the assent of the creditor, it will operate as a satisfaction."

* 19 Ohio, 362. (1850.)

Indiana.

In Indiana, in the case of *Prentiss* v. *Hinton*,† which is also similar to *Nadin* v. *Battie*, Sullivan, J., says, —"The common law principle is that if a debtor, who is in custody under a *ca. sa.*, be discharged with the plaintiff's consent, it operates as a discharge of the judgment."

† 6 Blackford, 35. (1841.)

South Carolina.

So, also, in South Carolina, in the case of *Eggart* v. *Barnstine*,* Johnson, J., says,—"By the common law, the discharge of a defendant, arrested on a *ca. sa.*, was a satisfaction of the judgment."

‡3 M'Cord, 165. (1825).

Pennsylvania.

The law of Pennsylvania in 1830 on this subject was the common law of England, and of the other American States, as laid down in the authorities we have already cited.

In *Freeman* v. *Ruston*,§ the Court said: "The law is settled in England that a *ca. sa.* operates as a satisfaction of the debt, as an extinguishment of the lien of the judgment. *We have no other rule prescribed to us in Pennsylvania*, nor can we conceive that there would be any policy or justice in departing from it.

§ 4 Dallas, 214, 217. (1800.)

Sharpe v. *Speckenagle*|| where the question arose as

|| 3 Sergeant & Rawle, 463. (1817.)

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to the effect of a discharge under the insolvent laws of Pennsylvania, of a person in execution under a *ca. sa.* C. J. Tilghman said, "that the arrest on a *capias ad satisfaciendum* is in itself a satisfaction of the debt, is a position not to be maintained *unless the plaintiff consented to the discharge; then indeed the debt is gone.*"

* § 31.

The Statute of 16th June, 1836,* enacts, that "a judgment shall not be deemed to be satisfied by the arrest or imprisonment of the defendant upon a *capias ad satisfaciendum*, if such defendant die in prison, or escape, or be discharged therefrom by reason of any privilege, "*or at his own request;*" but the party entitled to the benefit of the judgment may have such remedies at law for the recovery thereof as he would have been entitled to if such *capias ad satisfaciendum* had not been issued, &c. And the case of *Jackson* v. *Knight*,† so much relied on by the other side, was decided in 1842, and was governed by this act. The agreement to discharge the defendant from imprisonment was dated 10th October, 1840, and on the argument the counsel for the plaintiff in error cited the section above quoted.

†4 Watts & Sergeant, 412.

II. There is no fraud nor any such mistake in the case as equity will relieve against. If there was a fraud, it was one practised by the plaintiff on himself. His own attorney drew his agreement exactly as he saw fit. He was not bound to draw it at all. He did it advisedly, of course. It is not only signed by him, but in his handwriting. To impute the successful perpetration of a fraud or a palpable ignorance of the rudimental principles of law and practice in the case of counsel so advised, so practised and so eminent, is what we should be slow to do ourselves,

and what we will not suffer the other side so greatly to underate the ability of our older and very able bar—as to do, even where they are without any other resort of argument.

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Grier, J. The bill is undoubtedly drawn with much ingenuity, and in view of the difficulties in which the learned pleader saw it to be encompassed. He has, therefore, by allegations of fraud and mistake, endeavoured to draw the case within those well known heads of chancery jurisdiction. But the facts and circumstances stated in the bill, show that there was neither fraud nor mistake in the case.

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If a man, ignorant of the law that the release of one joint debtor is a release of the other, should give such a release, equity will not interfere to protect him against the legal consequences of his act.* And even if the mere allegation of a mistake of the law would give jurisdiction to Courts of equity, and be a sufficient ground for relief, the documents connected with this transaction, being executed by most able and learned counsel, leave not the slightest room for any pretence of a mistake of the law. On the contrary, it will appear (as we shall show) that they were fully aware of the legal effect and consequences of the voluntary discharge of the defendant from imprisonment, and obtained all that they expected to obtain by his arrest.

*Hunt v. Rousmaniere, 1 Peters, 1.

Assuming, for the purposes of this case, that *if* the defendant had obtained his discharge from the arrest by fraud and deceit practised on the plaintiff, equity would interfere and annul the discharge so obtained, as to all its legal effects prejudicial to the defrauded party; yet the facts stated in the plaintiffs' bill do

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not allege such a case. Thomson made no false representations in order to obtain his discharge; he made no concealment of his property; he gave security to pay the value of the property settled on his wife, if it should be determined that the property was liable to the payment of such debts; he fulfilled his contract in good faith. These facts are all admitted by the bill which sets forth the agreement. But the imputation of fraud, which it is supposed will justify the interference of a court of equity, is the fact that the defendant and plaintiff differ in their construction of the intention and legal effect of that agreement. And the bill prays that the defendant may be enjoined from setting up *his* construction of it in a Court of law, by way of defence to the plaintiffs' claim. Much as this bill has been seasoned with the phrases "fraudulently, deceitfully," &c.; this is, in fact, all the fraud imputed to the defendant. A court of equity, when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them.

The case presented by the bill, stripped of all unnecessary epithets, is, in short this: The complainants obtained a judgment against the defendant some twenty-five years ago. The only property in possession of the defendant, from which the judgment could in whole or in part be satisfied, was that contained in his marriage settlement, and conveyed for the trusts of that settlement. Whether this settlement was fraudulent or void as against creditors, and this property liable to be taken in execution, was a doubtful question. No bankrupt law was then in existence, by which the defendant could be compelled to assign

for the use of his creditors, and thus have the question tried. The plaintiffs, therefore, arrest his body on a *ca. sa.*; the defendant proposes to give them security for the value of all the property contained in the marriage settlement, and all other of which he was possessed, if they will release him; and if, on the trial of an issue for that purpose, the Court shall decide that this settlement was void, as against creditors, then the whole amount to be applied to the satisfaction of the plaintiffs' judgment.

By this contract the plaintiffs obtained a greater advantage than they could have expected from any general insolvent assignment. For if they had continued to hold the defendant's body, he might have made an assignment with preferences, and afterwards obtained his discharge under the laws of the United States. But by this contract they obtained *all*, even if that *all* turned out to be nothing. The chance of setting aside the marriage settlement was considered a good one, and well worthy of pursuit; while the expectancy dependent on the chances of his surviving his wife, and failure of issue, was held of no account.

We can see nothing in this transaction tending to show, either that the plaintiffs were not fully aware of the legal effect of the arrest and voluntary discharge of the defendant, or that, after having obtained from defendant an assignment with security to deliver all his property to the sole use of the plaintiffs' execution, they ever calculated on the probability or possibility that Thomson might thereafter acquire property, and be subject to future executions; or intended that this judgment should, notwithstanding his arrest and assignment, remain as an *incubus* upon all his future struggles to amend his fortunes. Con-

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tent with the surrender of all the property within the power and control of the defendant, they did not covenant for his future earnings or possible acquisitions, nor for the renewed imprisonment of his body at their discretion. It is not usual to exact such hard bargains. It was a case of actual mercantile bankruptcy, without a technical discharge under a bankrupt law; and we see no reason to believe that either party, at the time of the contract, had any intention that there should be any future recourse to the judgment. They took good security for the performance of the agreement which was the consideration of defendant's release, knowing that such a release would operate as a legal satisfaction of their judgment. The transaction was *bona fide*, without any suspicion of deceit, misrepresentation, or fraud, on the part of defendant. Why, then, should equity interfere, if the judgment stands satisfied at law?

When a plaintiff has a valid legal judgment, equity may interfere as ancillary to a court of law, to enable the plaintiff to reach means of actual satisfaction, which were beyond the grasp of an execution. But where a judgment is satisfied at law, equity will not interfere, unless where this satisfaction has been obtained by fraud or deceit, or made under some mistake of fact. As the facts exhibited by this bill, when severed from the epithets and adjectives used in framing it, show a transaction of which these qualities cannot be predicated; the defendant seems to have supported the first proposition of the hypothesis stated in their demurrer, viz., that if the arrest and discharge of defendant has operated as a legal satisfaction of the judgment, the plaintiffs have shown no sufficient ground for the interference of a court of

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equity. The second proposition, that if the arrest and discharge had no such operation in law, then plaintiffs have full and adequate relief at law, is one which needs no argument; and, as a necessary corollary, this bill would have to be dismissed.

But as the question as to the legal effect of this arrest and discharge will recur to us immediately, on the law side of the Court, and as its decision cannot be avoided by leaving it to another tribunal; and, moreover, as it has been fully and ably argued by the learned counsel, it will be proper to notice it and state our conclusions.

The doctrines of law as laid down by C. J. Hobart, in *Foster* v. *Jackson*,* seem to have been sanctioned by the subsequent decisions in England and this country. *Blumfield's case*,† reported by Lord Coke, which preceded it, is noticed in that decision. The difference of opinion between the learned judges, Coke and Hobart, as expressed in these cases, seems to have caused the statute of 21 Jac. I. c., 24, which gives an execution against a defendant's lands and goods, who has been arrested and died in prison. The question in *Blumfield's case* arose, where the plaintiff had several judgments against joint and several debtors for the same debt. It was decided that the arrest and discharge of the defendant in one judgment was not actual satisfaction of the debt so as to bar an execution on the other judgment. The distinction between actual satisfaction as regards other parties bound for the same debt, and the legal and *quasi* satisfaction as between the parties, by an arrest and discharge of the defendant, is admitted in the case of *Foster* v. *Jackson*. To this extent *Blumfield's case* has always been held as good law; but

* Hobart, 60

† 5th Reports, 86, b.

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the other *dicta* and speculations of the learned reporter of that case cannot be received to affect the authority of the subsequent cases.

Without attempting to notice all the cases which are to be found in the more modern books of reports, the following may be stated as containing principles which have been universally admitted to be correct law, both in England and this country. They all proceed on the admitted axiom, that as between the parties, plaintiff and defendant, in the judgments, the arrest of the body of the defendant is legal satisfaction of the judgment, unless the party has been discharged by the act of God, or the act of law, without the plaintiff's consent.

* 4 Burrow, 2483.
† 1 Term, 557.

Thus, in *Vigers* v. *Aldrich** and *Jaques* v. *Withy*,† it is decided, that if a defendant has been taken in execution and discharged on an agreement, the judgment is satisfied, and the action must be on the agreement. *Clark* v. *Clement*,‡ and *Tanner* v. *Hague*,§ confirm the same doctrine. In *Blackburn* v. *Stupart*,‖ reported by East, where the defendant was discharged on his agreement that he should be liable to be taken in execution again, it was held that the defendant could not be twice held in execution on the same judgment.

‡ 6 Id. 525.
§ 7 Id. 420.
‖ 2 East, 243.

The question in the Pennsylvania case of *Sharpe* v. *Speckenagle*¶ was, whether a discharge of the principal under the bread act, operated such a satisfaction of the judgment as could be pleaded by the bail in an action on his recognisance; and it was decided that it did not, on two grounds:

¶ 3 Sergeant & Rawle, 463.

1st. Because the surety in a collateral suit could only set up actual satisfaction; and

2dly. The act of assembly permitting the dis-

charge of the principal, provided that it should not acquit any other person bound for the debt.

This decision does not in the least deny the doctrine of the English case, *Blackburn* v. *Stupart*, already referred to and reported by East, but rather admits and affirms it.

The other case, *Jackson* v. *Knight*, would, as a statement of *common law doctrines*, be somewhat anomalous; but this decision was after the common law had been changed by statute, which allows another execution where the "defendant is discharged at his own request." The necessity for such a provision in the statute, is evidence of the state of the law antecedently.

If the plaintiffs in this case had exacted from the defendant, as the price of his discharge, not only an assignment of all his property, but also a covenant and agreement that the judgment should be considered as unsatisfied, and that his property and his body should be liable at any time thereafter to be seized in execution, we think it clear that this latter agreement would be treated at law as altogether void. The common law, while it gave the power to the creditor of seizing the body of his debtor in execution, discouraged the use of a power so liable to abuse. It treated such an arrest as the *ultima ratio*, the end of all executions on that judgment, and legal satisfaction of it; and while it left the imprisoned debtor capable of making any contract for future payment, as a consideration for his discharge by the creditor, it gave such creditor no further remedy than he could obtain by an action on such contract. An agreement made by the debtor, under duress of imprisonment, by which he should be again liable to

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imprisonment on the same judgment, was contrary to the policy of the law, and void. He was not permitted, when once in duress, to bargain away his liberty.

It is very evident, also, that an executory agreement which may be made the consideration of the discharge, even though indorsed on the execution, or filed in the Court, can neither be treated as a judgment nor recognisance, or as matter of record of any description; and if it be not under seal, the action on it will be as liable to be defeated by a plea of the statute of limitations, as it would be on any other simple contract.

Now, the argument for the plaintiffs in this case assumes that the agreement was intended to give the plaintiffs a right to issue further executions on this judgment; and, as we have seen, if such were its literal tenor, it would be void. But we think it due to the plaintiffs to say, that a proper construction of this contract will vindicate them from the charge of exacting so hard a bargain from a debtor under duress of imprisonment, and more especially when the debt is one of suretyship only. Among mercantile men, if a debtor, and more especially a surety, surrenders all his present property to his creditors, it is not usual to exact a lien on his future acquisitions. This agreement, while it very properly demands, as the price of defendant's discharge, an assignment of all his property, and security for its delivery, in case the issue as to the validity of the marriage settlement should be adjudged in favour of plaintiffs, does not contain, in direct terms, any covenant that the arrest and discharge should not operate as satisfaction of the judgment, or that future

executions might be issued on it. It merely states, in general terms, (what was no doubt a fact) that the agreement to release the defendant, was for *his accommodation*, and covenants that no "prejudice whatever should arise to the plaintiffs' right by the defendant's enlargement, or *otherwise however*."

Now, the very learned counsel for plaintiffs, who dictated this instrument, well knew that this arrest and voluntary discharge of the defendant operated as a *legal discharge of the judgment;* and he knew, also, that a court of law would not regard any agreement for future execution made by a prisoner, as binding. He cannot, therefore, be presumed, by this very vague and indefinite language, to have intended what he was unwilling to express in plain terms, to wit, that the defendant having given good security for the delivery of all his property to plaintiff, as the price of his discharge, should nevertheless be liable to imprisonment the next day, or at any time thereafter. Yet such is the construction which it is now contended should be given to this language, a construction which makes the plaintiff take, and the defendant give, every thing for nothing.

What, then, may be supposed to have been intended by these words, "prejudice to the plaintiffs' rights?" When lawyers covenant about judgments and executions, they do not usually seek out such ambiguous and general phrases to express their meaning. What were the plaintiffs' "rights" which were the subject-matter of the contract? For to these must we look to ascertain the meaning of this clause. The right they contracted for, and for which they got security, was the application of all the property of defendant to *their* debt. Whether that all

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was much or little, cannot affect the case. They considered the marriage settlement as void; the chance of setting it aside valuable; and the chance, from the possibility of Thomson's survivorship, without children of the marriage, as nothing. They accordingly agreed, that if the issue should be decided against them, the "property should be entirely discharged." Knowing that the discharge of defendant operated as satisfaction of the judgment, they were anxious that the "rights" obtained by the contract as a consideration for it, should not be affected. The language used plainly indicates some uncertainty in the mind of the scrivener, whether the discharge might not be possibly set up as actual satisfaction of the debt, and not merely as technical satisfaction of the judgment. To guard against any such attempt to affect or injure the "rights" which were the subject of the contract, and guaranteed to plaintiffs by it *ex majore cautelâ*, was this language inserted in it. The words "otherwise, however," mean anything or nothing, and only tend to show that there was some vague notion of a possible legal advantage which might be taken, and which the learned counsel could not foresee clearly, and thought might be excluded by these comprehensive terms.

The intelligent and honourable men who executed this agreement cannot be supposed incapable of expressing clearly their intention. Nor can we presume any intention to coerce the defendant into so hard a bargain, or conceal it under vague and ambiguous generalities, as a different construction of this agreement would import.

We are of opinion therefore:

1st. That the judgment against the defendant was

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legally satisfied by his arrest in execution and voluntary discharge.

2d. That this effect of his discharge was not affected nor intended so to be, by any thing contained in the agreement made on that occasion.

3d. That the bill shows no reason for setting aside this contract on the ground of fraud or mistake.

4th. That it is no part of the functions of a Court of equity to enjoin a defendant from setting up a legal and just defence in a Court of law, under the allegation that it is a fraud for him to differ with the plaintiffs in their construction of his contract. The defendant has as good a right to impute fraud to the plaintiffs for the construction they put upon it. The Court imputes it to neither party, but dismisses the bill with costs.

DECREE ACCORDINGLY.

[April sessions, 1851, no. 6, equity docket.]

THE UNITED STATES V. BRUNE.

[EVIDENCE: OWNERSHIP OF VESSELS. SHIP'S REGISTRY.]

On an indictment under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American Registry is not even *primâ facie* evidence of such ownership; though such registry is made by the government only on the pre-supposition of such ownership, and after oath by one or more persons of such ownership by them. Nor is general reputation of such ownership any evidence of it. Ownership in such a case is a fact to be proved as other facts.

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STATEMENT.

A LAW of Congress for the suppression of the slave trade,* enacts that if any person being of a ship's company of any vessel *owned wholly or in part by any citizen of the United States*, shall aid and abet in confining any negro, &c., with intent to make such negro a slave, he shall be adjudged a pirate. And an indictment in this case charged that Brune, being second mate of the brig Fame, *owned by a citizen and citizens of the United States*, did forcibly, feloniously and piratically receive, aid and abet in confining and detaining on board such vessel 400 negroes with intent to make them slaves, contrary to the form of the Act of Congress, &c. The fact that the defendant had been engaged in a slaving voyage, was perfectly proved: and to prove that the vessel was owned by a citizen and citizens of the United States, the prosecution, without offering to follow it up by other evidence, offered the ship's registry, and evidence of general reputation of ownership, that is to say, "that she was said to belong to citizens of the United States by all persons who talked of her." This *registry*, as is generally known, is made under an Act of Congress,† declaring what vessels shall be "denominated

* Act of 15th May, 1820, ch. 113, § 5.

† Act of 31 December, 1792.

and deemed *vessels of the United States entitled to the benefits and privileges appertaining to such vessels.*" It prescribes that before the registry can be made, the owner or one of the owners shall swear (among other facts) "that she is owned wholly or in part by a citizen of the United States," after which the registry is made.

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Statement.

Mr. *J. C. Vandyke.* We object to this evidence: 1st. The registry offered is not the best evidence; and can only be offered where there is an intention of following it with other and more positive proof of ownership. It is necessary as part of the proof of ownership; but it is not in itself proof of ownership. It is the act of a third party done from motives of pecuniary interest, and is inadmissible to affect the rights of one upon trial for life or death.

For the Registry.

2d. It is a document, having its origin in statutory provisions. It was unknown to the common or civil law, and was created in England by statute of 12 Car. 2, in 1660, for certain purposes; and was afterwards introduced into the French Code, and subsequently in 1792, became by special enactment part of the marine regulation of the federal government. The original English act did not require the owners to be citizens. There is no act upon the subject, either in England or America, making the registry *proof* of ownership. The registry is required to give the ship a national character, and to entitle the owners to certain privileges, and can only be used for the purposes specified in the acts creating it; and then only in the manner authorized by the act.

Ownership is the essence of the case. It is a fact, which must be proved, however difficult, before the

Ap'l Sessions, 1852.

defendant can be adjudged a pirate. Common reputation will not do; for common reputation is often a common liar.

Against the Registry.

Mr. *Pettit* and Mr. *P. N. Dallas*, in reply, insisted, that the registry was evidence of the national character of the ship, which, by the terms of the registry act, is based upon ownership by citizens of the United States; that independently of this, the general reputation of ownership was the only evidence possible to be produced in establishing that fact. If more was required, it would be impossible to convict any man where the question of ownership arose. The practice, in this Court and in the Admiralty, has been in cases generally where national character and American ownership is to be proved, to admit the registry as *primâ facie* proof; and there is no reason why this case should come under a different rule than that which has been generally adopted. We offer it only as *primâ facie* evidence. The other side may show the truth if it does not.

The Court's Opinion.

GRIER, J. The very gist of this indictment is the ownership *by a citizen or citizens of the United States*. The act of Congress makes it so. The indictment properly alleges it, and it must of course be proved. The registry, though it may perhaps be evidence of ownership for some purposes, is not even *primâ facie* evidence of it in a criminal prosecution like this; nor would common reputation be. You must show the fact of ownership, as you generally show other facts; proving it by witnesses whom the defendant may cross-examine. The man, who swears that he owns the vessel, may have sworn to an untruth, and

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THE COURT'S OPINION.

she may not be owned, either "wholly or in part, by any citizen of the United States" at all. And even if the persons set forth in the registry as owners, were owners at the date of it, their ownership may in point of fact have ceased before the alleged piracy, though the proper entry or no entry may have been made at the custom-house.

If the act had ordained that the detention, &c., on any vessel "denominated and deemed a vessel of the United States," should be piracy, the case might be different. The registry, whether granted on a true or a false oath, settles that. But the act requires that the vessel be *owned by a citizen or citizens of the United States:* a different thing and a fact; of which the oath before the collector of customs is no more evidence in a case like this, than an oath before any other person would be. It was extrajudicial, not in this case, *ex parte*, and without a single requisite to make it evidence.(A)

[OCTOBER SESSIONS, 1843, NO. 2, CRIMINAL DOCKET.]

(A) The prosecution not being prepared with other evidence, the Court charged in favour of the prisoner. The jury found a verdict of "Not Guilty under the charge of the Court; but guilty in point of fact;" a verdict of course which the Court obliged them to alter to one of Not Guilty. Verdict.

BARQUE DELAWARE V. STEAMER OSPREY.

[COLLISION AT NIGHT: STEAMER AND SAILING VESSEL: SIGNAL LIGHTS.]

Although the Court cannot establish a rule to bind vessels navigating the high seas to carry signal lights, yet where one vessel does so and another does not, the Court, in case of a collision, will go some way to treat the dark boat as the wrong doer.

The Court going in advance of hitherto adjudicated cases, would seem to enforce the obligation upon all boats navigating bays and rivers, not only to show lights on an approach, but to carry them constantly.

Ap'l Sessions, 1852.

Statement.

The steamer Osprey was on her way to sea, out of Delaware Bay, with three signal lanterns in place, heading for the lights of Cape Henlopen, on the West. The barque Delaware, without any lights, came into the Capes with the wind free to pass up the bay, and the tide against her. When at some distance from the steamer, the sails of the barque *shut out* the Cape Henlopen lights from the pilot of the steamer, and from this fact the pilot inferred a sailing vessel was between him and them, and of course, that the sailing vessel was heading to *starboard* of the steamer. But the barque having no lights, and the night being very dark, neither her courses nor position were, after this, discoverable. Both vessels went on at their previous speed—that of the steamer about ten or eleven miles an hour; that of the barque four or five; and they were approaching each other at the rate of a mile in about four minutes. The steamer, having the tide, was approaching much faster than the captain of the barque was aware of. The captain of the barque, who was on deck, first saw the steamer's lights five

miles off, but was not certain, for some time, that the vessel was a steamer. Being satisfied at last on this point, he ordered a signal light to be shown. The rapidity with which the vessels had approached and were still approaching, made the interval between this and the moment of collision, too short. The light did not appear to have been seen by the steamer's pilot, and the evidence, which was conflicting, made it doubtful whether it had been exhibited before the collision become inevitable. Approaching in the rapid way above stated, and supposing the barque *still to be*, as her shutting out the Henlopen lights showed she *had been*, on the other side, the steamer put her helm to starboard; while the captain of the barque, not knowing that he had shut out these lights from the steamer, nor of the inference the steamer had drawn, that the barque was to the starboard, put his vessel to the starboard too, in order that the vessels might pass larboard to larboard. The steamer ran against the bow of the barque. Whether, if the barque had not gone to starboard, and had kept on her course, she would have cleared the steamer entirely, or whether, on the other hand, she would have been struck right amidships, and so gone to the bottom at once, was a matter about which the testimony conflicted. The two vessels came in collision near the bow of the barque, the wheels of the steamer rolling over the barque, and doing her, as the barque also did to the steamer, considerable damage. Cross libels were now filed.

By the usage of Delaware Bay, vessels at anchor always hang out a light. Those not at anchor, usually, or often sail without them, steamers excepted;

Ap'l Sessions, 1852.

which, by statutes of the United States, as well as of Pennsylvania and New Jersey, are obliged to carry lights.

Argument for the Barque.

Mr. *W. B. Reed* and Mr. *St. G. T. Campbell* for the barque. The barque was not bound to carry lights. No maritime usage requires merchant vessels constantly to carry lights;* nor do the rules of the Trinity masters, which we adopt.† The statute of Pennsylvania does not apply to Delaware Bay: and the statutes of the United States and of New Jersey, by confining the obligation of lights to steamers, directly exempt sailing vessels from the same obligation. By the usage and obligation of Delaware Bay, vessels at anchor alone exhibit the signal lights. Had the barque exhibited such lights, she would probably have been assumed to be at anchor. They would have been false lights. She showed a light as soon as she saw a vessel approaching. She was not bound to do more. In other respects she conformed to the rules of good navigation. She had a watch on deck. She did not alter her course until it was rendered imminently necessary by the act of the steamer. Considering the darkness of the night, and the fact that she knew a vessel was somewhere ahead, the steamer was not navigated with the requisite caution. She was in a bay. She should have eased off for a few minutes. Admit that the barque ought to have carried lights, so that the steamer could have gone on without easing off, this is not important here, for in point of fact the barque was seen by the steamer, by her shutting out the Cape Henlopen lights. There was enough to put the steamer on her guard. Admitting the barque's fault, the steamer

* The Rose, 2 W. Robinson, 4.
† The Iron Duke, Id. 377.

Ap'l Sessions, 1852.

Argument for the Barque.

had no right to run her down for it; the usual consequences of the fault having to a great degree been accidentally obviated in another way, st. by the shutting off the Henlopen lights. The case of *The James Watt** is much in point. "Where a steamer coming down the river, upon a dark night, meets a sailing vessel beating up the river, and the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines and to slacken her speed, until he ascertains the course of the sailing vessel." "A defence—that the master of the steamer, under the circumstances, immediately put her helm to port, in compliance with the Trinity House regulations—not sustained."

* 2 W. Robinson, 270, Syllabus.

It is true that case differs from this in the fact that there the sailing vessel was *beating* up the river, while here she had the wind free. But the case rests much more on the distinction between steamers and sailing vessels, the former of which, says Sir J. Nicholl, in another case,† while they "are of vast power, liable to inflict great injury," may at the same time, with due vigilance easily avoid doing damage, for they are much under command, both by altering the helm and by stopping the engines." Even at her speed she would have gone clear had she kept her course, or ported her helm. The change from it, made suddenly and unwisely, in the circumstances, caused the collision. The counsel then cited many cases to show that the conduct of the barque when she came into close proximity of the steamer, was conformed to the directions of the Trinity masters, and our own laws in the cases of vessels in positions like these and in danger of collision.

† The Perth, 3 Haggard's Admiralty, 414.

Ap'l Sessions, 1852.

Argument for the Steamer.

Mr. *G. M. Wharton* and Mr. *Balch*, on the other side, made the following points.

1. The steamer pursued her course, the usual one, without change until the pilot saw the barque; from and after which point of time every thing possible was done on board the steamer to avoid and prevent the collision.

2. Backing the steamer with her helm to starboard was equivalent to going ahead with her helm to port.

3. Conceding that the steamer was going ahead with her helm a-starboard, this was the only manœuvre left to her, and was the proper one under the circumstances of the case.

4. The barque, having the wind free, but with head tide, was more manageable than under any other circumstances.

5. The barque should have kept her helm to port, instead of putting it to starboard; in which case she would have gone clear of the steamer.

6. It was the duty of the barque, which had descried the steamer five miles off, to do every thing in her power to avoid the collision by showing a light, making a noise, &c.

7. The barque, in putting her helm to starboard, in not backing or easing her sails, and especially in disregarding the order to port her helm, violated all maritime law and usage.

8. The night being dark, the barque should have carried a light. "The want of a lantern in narrow waters," says Jacobsen,(A) "has always been looked

(A) Jacobsen Seerecht, Altona, 1815, p. 477. Der Mangel einer Leuchte im engen Fahrwasser ist immer als ein solches Versehen angesehen geworden, dass einem Schiffe ohne Leuchte, Schadenersatz aberkannt ist. So geschah es auf

Ap'l Sessions, 1852.

upon as such a neglect that against any vessel without a light, the verdict was for re-imbursement of damages sustained. Thus it was decided on motion of Bynkershœck, in a case pending in the Supreme Court of Holland.* The same was the verdict of the Rota Fiorentena, May 8th, 1766, in the case of Captain Ramkins, reported by Baldazzeroni."†

Argument for the Steamer.

*Questiones Juris. Lib. IV., Cap. 22.

† Tom. II. Pars 4, Tit. VI. § 38.

If the rules of the Trinity Masters prescribe in this respect any other rule, it is time for our Courts to depart from obedience to them in that particular. We have a river commerce, and a commerce in bays and other narrow waters, much greater than that of England: and it is becoming matter of necessity that the Court make it obligatory on all vessels to carry lights every where.

The Court's Opinion. Grier, J.

Grier, J. Taking all the other circumstances of this case together, and omitting the fact of almost total darkness, and that the barque could see the steamboat while the steamboat could not see the barque, the steamboat would have clearly been held liable for the damages of the collision. It is true there is no law requiring vessels navigating the high seas after night to carry signal lights, and it is much to be regretted that it is not so. But the barque had the wind free, and the tide against her, and she had power, therefore, to give the steamer a wide berth, and to obviate collision. The steamer had three lights; the barque had none. Now, if the steamer had the same opportunity of observing the course of

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den Antrag von Bynkershoeck in einer vor dem hohen Gerichtshofe von Holland pendenten Sache. (Quaestiones juris. Lib. 4, Cap. 22.)

Eben so wurde erkannt von der Rota Fiorentina, den 8ten Mai 1766, in der Sache des Capitains Ramkins. (Baldazzeroni. Tom. 2. Pars 4. Tit. 6. § 38.)

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The Court's Opinion. Grier, J.

the barque, the latter knowing this fact would have a right to expect a consequent caution on the part of the steamer. But I think it is plain from the testimony, that the light shown by the barque was too late to be of any benefit, or to warn the steamer of its approach, till the very moment of the collision. The warning given of the approach of the barque by her sails intercepting the light from the lighthouse, like that of the lamp from the barque, was also too late, as well as too uncertain to justify the steamboat in taking any other mode of escaping collision than those she did take. The order to starboard the helm before stopping the boat, and reversing her engine, may have been wrong, and it may be true that these latter orders were not fully executed at the time of the collision. It may be true, also, the order of the barque to starboard her helm, and disregard that of the steamboat captain to port it, was correct, and the only way of avoiding a collision which would have destroyed the barque. But these considerations cannot affect the case. It was the fault of the barque, and not of the steamboat, that the vessels were brought into such proximity that such mistakes might be made in the dark, when the pilot of the steamboat could neither judge of the distance between the approximating vessels, the rates of their approach, nor the relative angle of their respective courses. It was the duty of the barque, which could see, to give a wide berth to the boat, which could not see, and not to leave it in the power of her pilot, by a mistake in a moment of surprise, to cause a collision.

The rule of passing to the right, or porting the helm, in cases of vessels meeting on the same line, is founded on the supposition, that each party can see

Ap'l Sessions, 1852.

The Court's Opinion. Grier, J.

the other. But where one is blind, and the other knows it, he should not put himself within reach of injury by any mistake of the blind, or run over him or knock him down for not observing the rule.

The Court cannot establish any rule to bind vessels navigating the high seas after night to carry signal lights; but where one party does this, and the other does not, we can and will treat (in a case *cæteris paribus*) the dark boat as the wrong doer, and liable to make reparation. In rivers and narrow channels, and in harbours, there are generally local regulations requiring it. But if there be not, it would still be advisable for vessels sailing either in close or open channels, to keep proper lights if they wish to seek the courts, in case of collision.

Kane, J.

Kane, J. The rules of navigation which we derive from the Trinity Masters, apply to all cases of apprehended collision, and they are so convenient in practice as to make us most unwilling to relax their application. But to make them applicable at all, there must be reason for apprehending collision, as well as a possibility of escaping it without encountering some greater peril; they cannot be invoked therefore where obedience to the rules has been made impracticable or dangerous by the fault or carelessness of the other party.

There is no law which requires vessels navigating the high sea after dark to carry signal lights, and very much it is to be regretted. I can imagine no locality so remote or unfrequented as to dispense with the policy of such a practice. There is hardly a month that we do not read speculations about missing ships, especially ships navigating along our coast,

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The Court's Opinion. Kane, J.

and almost every old seaman can tell of encounters in the night with vessels that were run down and disappeared, leaving no memorial behind them. I should be very glad to follow in the wake of the first admiralty judge, who would hold the absence of a properly placed and well trimmed lantern to be *primâ facie* evidence of a culpable want of caution. Indeed, so important is some such regulation as this esteemed among the navigators of our river and bay, that I have been solicited more than once to assume its existence and enforce its observance. I would cheerfully do so, if I could find it among the ordinances of any legally constituted tribunal,—the directions of the Port Wardens for instance, who have in some respects the supervision of our river navigation, —or if the practice recently introduced by our sea-going steamers, were to a considerable extent recognised by others. For the present I confine my action in the matter to the two classes of cases for which statutory provision exists, or generally known usage.

The evidence in this case of collision is not reconcileable as to the circumstances that immediately preceded it. The steamer was on her way to sea with her signal lanterns in place, heading for Henlopen lights. The barque, without any lights, came into the Capes from the eastward, with the wind free to pass up the bay. The sails of the barque shut out the Henlopen lights from the pilot of the steamer. The barque was at this time of course heading to the starboard of the steamer's wake. The proper manœuvre on the steamer's part at this time, was by an inclination of her helm to starboard, so as to keep out of the barque's track. This manœuvre she executed, but the barque having executed the same

Ap'l Sessions, 1852.

The Court's Opinion. Kane, J.

manœuvre at about the same time, the two vessels approached each other. The difference between them was however in this, that the steamer exhibiting signal lights, her position and course could be well understood by the barque; but the barque exhibiting no lights, and having been last seen when heading to starboard of the steamer's wake, the steamer had no means of ascertaining the barque's approach and no cause for apprehending a collision. A light was shown on board the barque very shortly before the collision took place. But whether it was or was not exhibited early enough to make it strictly possible for the steamer to avert the accident, is not with me an important inquiry. The steamer had her full compliment of lights, and it was impossible that the barque could have incurred any hazard at all, if she had been content to hold her course, instead of luffing up as she did across the steamer's bows, obviously for the purpose of keeping well up to windward. Had she had lights, she might have done so with safety. Having none, she voluntarily took the risk of the collision, and must reap its fruits.

DECREE ACCORDINGLY.

[APRIL SESSIONS, 1852, NO. 1, COMMON LAW DOCKET.]

JONES V. THE INSURANCE COMPANY.

[INSURANCE: IMPLIED WARRANTY OF SEAWORTHINESS IN TIME POLICIES.]

Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all.

The Court, supposing on a case not before it says: It *may* indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; *or*, that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence.

Ap'l Sessions, 1852.

Statement.

THE plaintiff in this case declared on policies of insurance on the ship Sarah and Eliza, dated the 12th day of May, 1851, "lost or not lost from the first day of May, 1851, at noon, to May the first, 1852, at noon;" averring that during the continuance of the risk, to wit, about the first day of August, 1851, and proceeding on her voyage the said ship was, by the perils and dangers of the sea, &c., destroyed and totally lost.

A second count averred that during the continuance "of the risk in said policy mentioned, to wit, on or about the first day of July, 1851, the said ship Sarah and Eliza set sail and departed from a certain port, to wit, the port of Callao in South America, bound to the port of New York, and that the said ship so sailing and proceeding on her voyage afterwards, to wit, on or about the 23d day of the same month, and, while on the high seas, was, by the perils and dangers of the seas, &c., destroyed and wholly lost."

Ap'l Sessions, 1852.

Statement.

To this declaration the defendants pleaded *inter alia*,

I. That at the commencement of said voyage, the said vessel was unseaworthy, defective and insufficient, &c., and so continued to be and still was, at the time of the occurrence of the supposed perils and loss, &c.

II. That the said vessel was not sound and seaworthy at the time the risk in said policy mentioned attached, to wit, on the first day of May, 1851.

III. The said vessel was not sound and seaworthy at the time she was warranted so to be by the said plaintiff, according to the true tenor and effect of the said policy and contract of insurance.

To these pleas the plaintiff demurred, assigning as causes of demurrer, that the said pleas tender an immaterial issue, to wit, upon the seaworthiness and sufficiency of the vessel for the said voyage at the commencement of said voyage, and subsequently thereto, &c.

The question, therefore, raised by these demurrers and argued, was, *whether there is an implied warranty of seaworthiness in time policies, as well as in policies on a voyage?*

After argument by Mr. *T. I. Wharton* and Mr. *Henry Wharton*, in support of the demurrer, and by Mr. *W. Rawle* and Mr. *J. Fallon*, on the other side, the opinion of the Court was given by

The Court's Opinion. November 5th.

Grier, J. Although some of the treatises on Marine Insurance do not, in treating this subject, make any distinction between voyage and time policies, and many *dicta* of judges may be found, to the same effect, while others* express doubt, the precise point

* See Paddock v. Franklin Ins. Co., 11 Pickering, 231, and cases there cited.

Ap'l Sessions, 1852.

The Court's Opinion.

* 3 English Law & Equity, 290-9; 14 Jurist, 368; 15 Id. 325.

does not appear to have been decided on full argument in a court of error till very lately. The case of *Small* v. *Gibson** was first argued and decided in the Queen's Bench, in November, 1850, and it was there decided, "that there is an implied warranty of seaworthiness in *time* policies, if nothing appear in them to the contrary, as well as in policies on a voyage." This case was removed by writ of error to the Exchequer Chamber, where the judgment of the Queen's Bench was reversed. The opinion of Baron Parke, which had the concurrence of the whole Court, contains a full review of all the cases and arguments bearing on the subject. This decision of a doubtful point is of the highest authority, and as I fully assent to the reasons on which it is founded, I consider it conclusive on the general question, and shall therefore content myself by referring to that case, where the arguments on both sides of the question have been exhausted by the counsel and Court. It is true this case does not decide, that there is no warranty of seaworthiness at all in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea that she was not seaworthy when the voyage commenced. It *may* be true, also, that there is in a time policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases the plea must state such facts and circumstances as shall show either that at the time the insurance commenced, the ship was

in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss—or that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might and ought to have been repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause, which may be attributed to the insufficiency of the ship.(A)

(A) Since this opinion was given, we have, (18 Jurist, 1131, December, 1853,) the report of *Small* v. *Gibson*, (the case cited as a precedent by the Court,) in the House of Lords, to which it was taken after the judgment mentioned by Mr. Justice Grier in the Exchequer Chamber. Nine judges gave able opinions to the House: seven being against implying a condition of seaworthiness, and two in favour of it. After the opinions were given, Lord St. Leonards and Lord Campbell delivered the judgment of the House, which affirmed the judgment of the Exchequer Chamber. Both these judges agreed very clearly, on the point decided, with the seven judges. On the point raised by Mr. Justice Grier in the conclusion of his opinion, which was one of the questions put by the House of Lords to the judges, though not a point necessary to be decided in the actual case, there appears to have been a difference of opinion between Lord St. Leonards and Lord Campbell. The former says: "If a ship were to sail on a particular voyage, and a time policy were to be effected instead of a policy on the intended voyage, as at present advised, I think that a condition would be implied that the ship was seaworthy at the commencement of the voyage." Lord Campbell, on the contrary, acting on a principle of simplicity and broad distinction, says as follows: "I have hesitated more upon the questions, whether, when a time policy is effected upon an outward bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in time policies there is no implied warranty of seaworthiness; and it is free from some strong objection to the condition of seaworthiness, being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no implied condition of seaworthiness in any time policy, and that the general rule being against the condition, as it seems to me—having the most sincere and perfect deference for the opinion of my noble and learned friend on this point, in which I do not agree—this would be a gratuitous and judge-made exception to the rule, and I think it more expedient that the rule should remain without any exception; and, as at present advised, I should decide against the implied condition in all cases of time policies. There is a broad distinction which may always be observed between time policies and voyage policies; but when you come to subdivide time policies into cases where the ship is in a British port, and where she is abroad, and still more, if the residence of the ship owner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable, therefore, that, in commercial

Ap'l Sessions, 1852.

The Court's Opinion.

As neither of these pleas comes within the conditions stated, we overrule them, and give

JUDGMENT FOR PLAINTIFF ON THE DEMURRERS.

[OCTOBER SESSIONS, 1852, NOS. 16 AND 17, COMMON LAW DOCKET.]

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transactions, there should be plain rules to go by, without qualification or exceptions. Marine insurance has been found most beneficial as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad, therefore, if it were understood, according to my present impression of the law, that in all voyage policies there is, and in no time policies framed in the usual terms is there, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce; and where any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I must offer with the greatest deference, after what has fallen from my noble and learned friend, for whose opinion on all subjects within the whole range of the laws of England, I entertain the most sincere respect."

GOODYEAR V. DAY.

[PERPETUAL INJUNCTION: COURT: JURY: ORIGINALITY OF INVENTION.]

Where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a patent, and of the fact of infringement, it will not send the case to a jury to have its verdict prior to granting a perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that a court can decide them on the testimony of men of science, as well as, or better than a jury; and where a jury trial would be long, costly or troublesome.

It is not necessary for the protection of a patent, that the patentee should be the first person, who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or valuable result. He who reduces speculation to practice; whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine or product, is entitled to the patent right.

MARCH SESS'S, 1852.

STATEMENT.

THIS was a case in equity for the infringement of a patent right in the manufacture of Vulcanized India Rubber. The bill prayed a perpetual injunction. The answer denied the allegations, and concluded by praying "a trial by jury of the various issues of fact formed by it." The argument involved many interesting inquiries; but facts were so interfused throughout the whole case, in the questions of law, that these last have not been found very capable of being reported. The pleadings were long; the proofs and exhibits very full, amounting to about 4000 printed pages; and they had been taken under an order, that they should be read either at law or in equity. The witnesses were numerous, and the questions were of a kind requiring much attention and intelligence. Both parties assumed to act under patents. The case having been set down for final hearing on the proofs and exhibits, and having been fully, learnedly and ably argued through a number

MARCH SESS'N, 1852.

STATEMENT.

of days by several counsel on both sides, Mr. *Daniel Webster* being of counsel for the complainant, and Mr. *Rufus Choate*, of counsel for the defendant, the main question of law was, whether in the face of the answer, denying positively the complainant's merits, and all infringement of his patent, and praying for a trial by jury of the issues involved, the Court would, under any circumstances, grant a perpetual injunction against him without a previous verdict. Another question partially mingled with a question of fact, was, what amount of prior discovery is necessary to deprive a subsequent discoverer of the merit of such originality as the law requires for the protection of a patent.

On the question of fact, the amount of prior discovery and the originality of Goodyear's results, the history of the case was essentially this. The gum called India Rubber, long known in Eastern countries, was first introduced, it would appear, into Europe by scientific French travellers, in 1736. They analyzed it in France, but without any profitable result. It became known in this country, about 1820. In 1823, five hundred pairs of gum shoes were imported and sold at Boston. At a somewhat later date, its valuable properties were strongly believed in, and the substance itself became the subject of scientific investigation in this country. Dr. Comstock, of Hartford, Conn., discovered, about 1828, that by dissolving it in turpentine, it could be made plastic, and spread upon cloth; a discovery for which he obtained a patent. Many other persons were convinced about the same time, that it could be made an article of great domestic or social use; but none of them could ever show how. Dr. Howe manufactured it in 1829,

at New York. Considerable factories of it were established soon after in different parts of New England. A factory at Roxbury began operations in 1832, was incorporated in 1833, and for some time pursued business with great apparent success. Numerous other factories, encouraged by the Roxbury factory, were in operation in 1834–5 and 6: and numbers of different articles were made there. The incurable difficulty of all these articles,—and it was a difficulty which rendered many of them entirely worthless,—was, their susceptibility to atmospheric variations of heat and cold. Exposed to warmth, they became soft, gluey and stuck together. Exposed to cold, they became perfectly rigid. All the factories failed; having produced nothing approaching the very extraordinary and valuable invention of Vulcanized Rubber. Notwithstanding this, there were many individuals, who were not entirely discouraged. They were deeply impressed with a belief, that gum caoutchouch was a most valuable substance, and could and would be made subservient to numerous most useful social ends. Some of these persons were more or less busy in experimenting; and many experiments were made. Some of them were senseless; some quite ingenious, and a few were *in* or alongside of the track of true science. Among these were the experiments of a very ingenious man, named Hayward, who, in 1838, discovered that a compound of sulphur with the gum greatly improved its qualities for some purposes, particularly that of spreading it upon cloth, the object for which he used it: and he obtained, in 1839, a patent for this discovery; which patent Goodyear afterwards bought of him. But neither Comstock's, Hayward's, nor any body else's dis-

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coveries produced the desired compound. In 1838, the factories of India Rubber goods had, with perhaps one or two exceptions where Hayward's patent was used, all come to an end.

Still after Hayward's discovery, the value of *sulphur*, or of kindred substances in improving the qualities of rubber, was known to many persons. The possibility of greatly increasing the value of it, by relieving the gum of its gluey nature when exposed to heat, and of its rigidity when exposed to cold, was strongly conjectured. Great numbers of experiments were made by individuals in many different and distant places, with sulphur, with heat, and many other processes. But although many men supposed they were very near to a discovery, and, as was now testified, many professed to believe that they could and would discover the desideratum, and knew that great benefits would be produced by the use of sulphur, gum and heat; as a matter of fact, no one did or could produce the thing wanted until it was produced, complete and perfect, and was patented as his own invention by Mr. Charles Goodyear, in or about the year 1844.

Goodyear had begun experimenting in 1834: he at that date turned his attention to the precise object of clearing this gum of its stickiness, its gluey nature, its tendency to harden in the cold, and soften in the heat. He began his experiments at Philadelphia. In the spring of 1835, he removed to New York; in the summer of 1836, he went to New Haven; in the spring of 1837, to Staten Island; in the fall of 1837, he visited the almost deserted factory at Roxbury. In the summer or fall of 1838, he went to Woburn, where Hayward was trying experiments with sulphur.

Here Goodyear bought the Sulphur Patent, and hired Hayward to assist him in his operations, and work for him a year. He went on with his experiments, and within four or five months, that is to say, in January, 1839, he made an elementary discovery of metallic or vulcanized rubber. In the fall of 1839, he carried on experiments at Lynn; and in like manner at Roxbury, in 1840; but keeping up his experiments, nevertheless, at Woburn, where his family lived.(A) In the fall of 1840, he went to Northamp-

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(A) Goodyear pursued his experiments under a great deal of ridicule and reproach, and at the same time in the greatest economical restrictions. These last had brought heavy debts upon him. He had a wife and several children, from whom, under the barbarous laws which then prevailed, of imprisonment for debt, he had been carried away and put in prison. In the course of the trial, an affecting letter was brought to light, written from the debtor's jail, in Boston. Here it is:

Debtor's Prison, April 21, 1840.

To Mr. John Haskins or Luke Baldwin.

GENTLEMEN: I have the pleasure to invite you to call and see me at my lodgings, on matters of business, and to communicate with my family, and possibly to establish an India Rubber factory for myself, on the spot. Do not fail to call on the receipt of this, as I feel some anxiety on account of my family. My father will probably arrange my affairs in relation to this hotel, which, after all, is perhaps as good a resting place as any this side the grave.

Your's, truly, CHARLES GOODYEAR.

"I believe," said Mr. Webster, in his noble speech in this case, "that the man who sits at this table, Charles Goodyear, is to go down to posterity in the history of the arts in this country, in that great class of inventors, at the head of which stands Robert Fulton; in which class stand the names of Whitney, and of Morse, and in which class will stand '*non post longo intervallo*,' the humble name of Charles Goodyear.

"Notwithstanding all the difficulties he encountered, he went on. If there was reproach, he bore it. If poverty, he suffered under it; but he went on, and these people followed him from step to step, from 1834 to 1839, or until a later period, when his invention was completed, and then they opened their eyes with astonishment. They then saw that what they had been treating with ridicule, was sublime; that what they had made the subject of reproach, was the exercise of great inventive genius; that what they had laughed at was the perseverance of a man of talent with great perceptive faculties, with indomitable perseverance and intellect, and had brought out a wonder as much to their astonishment, as if another sun had risen in the hemisphere above."

"He says of his cell in the debtor's jail, that 'it is as good a lodging as he may

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ton; in 1841, he removed to Springfield. His experiments were still going on at Woburn; as Hayward had come into his employment again for one year, from April, 1841. At Springfield, Goodyear continued his experiments, till he had so far perfected his invention, as to apply for a patent. This was in January, 1844. He then went to Naugatuck, in Connecticut, and started a factory, and soon after *vulcanized India Rubber became one of the most useful, extensive and best known products of civilized life.*

The great peculiarity of the vulcanizing process may be thus stated: If you take a compound of sulphur and rubber in a dry state, and grind and mix them together, and apply heat, the consequence is, that the substance softens and softens as the heat increases, until it reaches a certain height in the thermometer, say 212° Farenheit. All the experimenters but Goodyear, while they knew the effect of heat to a certain extent, and knew that it was valuable in producing the compound of the gum with sulphur, yet having found that a considerable degree

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expect this side the grave;' he hopes his friends will come and see him on the subject of India Rubber manufacture; and then he speaks of his family and of his wife. He had but two objects, his family and his discovery. In all his distress, and in all his trials, his wife was willing to participate in his sufferings, and endure everything, and hope everything; she was willing to be poor; she was willing to go to prison, if it was necessary, when he went to prison; she was willing to share with him everything; and that was his only solace. May it please your Honors, there is nothing upon the earth that can compare with the faithful attachment of a wife; no creature who for the object of her love, is so indomitable, so persevering, so ready to suffer and to die. Under the most depressing circumstances, woman's weakness becomes mighty power; her timidity becomes fearless courage; all her shrinking and sinking passes away, and her spirit acquires the firmness of marble—adamantine firmness, when circumstances drive her to put forth all her energies under the inspiration of her affections. Mr. Goodyear survived all this, and I am sure that he would go through the same suffering ten times again for the same consolation. He carried on his experiments perseveringly, and with success, and obtained a patent in 1844 for his great invention."

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of heat softened and rendered it more and more plastic, were of opinion, naturally enough, that if heat were carried still higher, the whole substance would melt. They reasoned *a priori*, and founded their conclusions upon a general knowledge of the effect of heat. But Goodyear, as the result of untiring experiment, found out, that although the application of heat produced a melting effect upon this compound, rendering it more and more plastic and soft, as the degree of heat augmented, *yet when that heat, going on, had got up to a certain much higher degree*, its effect was the reverse of what it had been, and then the rubber composition, commenced to vulcanize and harden; in fact to make metallic, the vegetable substance. And in *adding* to the compound of sulphur and gum used by Hayward, *a carbonate or other salt, or oxide of lead*, and subjecting the whole to this *high* degree of heat, was the distinguishing merit of Goodyear's process.

Against the Injunction.

Mr. *Choate* against the Injunction. No case can be produced, in which such an injunction was decreed unless on a reference by assent to the Chancellor. In *Bacon* v. *Jones*,* decided in 1839, Lord Cottenham says, after a cause comes to a hearing, without a trial at law, the Court may proceed and grant an injunction "although this is certainly not very likely to happen, *and I am not aware of any case in which it has happened*." This doctrine is thus summed up in Drewry,† "The ultimate object of a bill in equity to protect a patent is a perpetual injunction which can in general only be granted at the hearing, and it has been very lately decided that where a patentee files a bill alleging infringement and praying an account and

* 4 Mylne & Craig, 433.

† On Injunctions, Ch. III. § 6.

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perpetual injunction, but does not immediately or within any reasonable time apply for an interlocutory injunction, he cannot have a perpetual injunction at the hearing, if the defendant raises a question *as to the validity of the title*, nor will he be allowed to retain the bill with liberty to bring an action; for the Court will not permit the plaintiff to delay to the hearing the trial of the legal right which he might have had at any time after filing the bill, and thus to put the defendant in a position to have a chancery suit hanging over him for years. The *course the Court will adopt in such a case will be to dismiss the bill with costs.*"

* 3 Mylne & Craig, 14.

In *Motley* v. *Downman*,* A. D. 1837, Lord Cottenham says: "I can hardly conceive of a case in which the Court will at once interfere, by injunction, and prevent a defendant from disputing the plaintiff's legal title."

† Harman v. Jones, 1st Craig & Phillips, 299.
‡ Ambler, 406.
§ 2 Eden, 138.
‖ 3 Merivale, 622.
¶ 1 Paine, 441, 447.
** 4 Washington's Circuit Court, 514.
†† 4 Id. 584.
‡‡ 6 Simons, 297.
§§ 3 Mylne & Craig, 739.
‖‖ 3 Id. 14.
¶¶ 1 Beavan, 382.
*** 4 Mylne & Craig, 433.
††† Id. 487.
‡‡‡ 1 Craig & Phillips, 299.
§§§ 2 Phillips, 154.
‖‖‖ 2 Id. 333.
¶¶¶ 1 McNaghten & Gordon, 56.

2. In this jurisdiction, Chancery deals with legal and not with equitable rights. It will therefore refer to the common law to determine the existence of the right, which, when established, it will protect.†

3. The whole series of cases, both English and American, are an uniform administration of this doctrine. 1761, *Dodsley* v. *Kinnersley*.‡ 1762, *Baskett* v. *Cunningham*.§ 1817, *Hill* v. *Thompson*.‖ 1825, *Sullivan* v. *Redfield*.¶ 1825, *Rogers* v. *Abbott*.** 1826, *Ogle* v. *Ege*.†† 1833, *Martin* v. *Wright*.‡‡ 1836, *Bramwell* v. *Holcomb*.§§ 1837, *Motley* v. *Downman*.‖‖ 1839, *Bacon* v. *Spottiswoode*.¶¶ 1839, *Bacon* v. *Jones*.*** 1839, *Collard* v. *Allison*.††† 1841, *Harman* v. *Jones*.‡‡‡ 1846, *Spottiswoode* v. *Clark*.§§§ 1847, *Stevens* v. *Keating*.‖‖‖ And in 1849, *Pidding* v. *Franks*.¶¶¶

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Against the Injunction.

4. The answer, it is to be observed, denies entirely the validity of the complainant's patent, and his merits generally. "A denial, in answer as to the validity of the patent, or the fact of infringement, will be sufficient to entitle the defendant to further investigation in an action at law."*

* Curtis on Patents, § 340.

† On Injunctions, Ch. III. § 4.

5. Day claims under a patent himself. Drewry† says: "It was held in an early case, that in a conflict between parties both claiming under patents, the Court could not grant an injunction till the right had been tried at law, and I am not aware of any modern decision overruling this doctrine as to a conflict between two patents." Curtis‡ thus confirms the rule: "It seems that where both parties claim under patents, the Court cannot grant an injunction until the rights have been tried at law."

‡ On Patents, § 339.

On the question of originality, the counsel then went into an analysis of the evidence showing with great labour a case, which was essentially that set forth in the statement, and arguing from it, that the discoveries of Hayward and others took from Goodyear the merit of *such* originality as was requisite to sustain a monopoly.

For the Injunction.

Mr. *Webster* for the Injunction. 1. It never was an absolute rule of law in England, that the jury trial should precede a perpetual injunction. The question whether such a trial should be ordered, has been determined according to the sound discretion of the Court. Hindmarch§ says, in his Treatise on Patents: "If no action has been tried between the parties, the Court may either *itself* determine any question raised respecting the validity of the patent, or may send the question to a court of law to be deter-

§ Pp. 216, 356.

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mined, retaining the bill until the question is determined."*

2d. The cases in England in which an injunction was refused at the hearing, were presented on the pleadings only, not on pleadings and proofs; and the Court punished the plaintiff for *laches*, in not taking some means to have his title tried. Such is the case of *Bacon* v. *Jones*,† cited and relied on by the other side. The first sentence of Lord Cottenham's opinion confirms our view of the case. And in the course of his opinion, the Chancellor says: "In this case I have not heard any reason suggested why the plain and ordinary course was not taken by the plaintiffs of previously establishing their right at law." In another case,‡ Lord Langdale says, after speaking of an interlocutory injunction: "Notwithstanding this order, the defendant may put in his answer; he may displace all affidavits which have been filed on both sides. The plaintiff and the defendant may respectively proceed to evidence; they may bring their cause on for hearing, and upon the hearing of the cause, the *whole case*, the *law* regarding the patent, and *the facts which will appear upon the depositions* will have to be reconsidered, and that reconsideration may for any thing that can be known to the contrary, justly end in a result different from that which I have come to upon the present occasion. The defendant having his *option* to adopt this course of proceeding, has at the bar expressed his desire to have this matter tried at law." And he remarks: "It is not the right of parties in every case to have an action tried in a court of law; it is a question of convenience, and the Court is to exercise a fair discretion."

*Few v. Guppy, 1 Mylne & Craig, 487.

† 4 Mylne & Craig, 433.

‡ Wilson v. Tindal, Webster's Patent Cases, 730.

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For the Injunction.

3d. Our case is presented on the entire proofs taken by both parties in this very cause, and directed to be read in the cause by order of this Court.

4th. The Court has the power to determine the cause on the entire merits, and should do so unless there is either a positive rule of law, or some controlling necessity requiring aid from a jury. There is no such law or necessity. It is settled that when Equity directs a trial at law, it yet has the power to disregard the finding of the jury, and proceed to decree according to its own views of the case. That covers the whole ground. If you are not obliged to regard the finding of a jury when it comes before you, then of course, it must be in discretion whether to award an issue or not. This judicature is composed of two judges. There is a mass of testimony respecting a patent-right, and an alleged violation of that patent-right. The Court has listened with great patience to the reading of that evidence and to the comments upon it. We leave it with the Court, thus acquainted with the evidence, seeing the entire case, to say whether it feels that its conscience needs to be enlightened as to the merits of this controversy by a trial at the bar of this Court or elsewhere. Is there in this judicature a member who feels a reasonable conscientious doubt on any vital question of fact in this cause? It is proper to state it in that way because it is a question of *discretion*. It is not a question of right to be demanded on the one side or the other; it is a question of discretion,* arising after the collection of a vast body of evidence, after the promulgation of that evidence, after a final hearing of that evidence, and when the cause is ripe for decision, and a perpetual injunction, unless the Court

* Harmer v. Plane, 14 Vesey, 130, 131.

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feels conscientiously that there is something affecting the right of the parties still untold, which they cannot with conscientious conviction settle themselves, and in regard to which they have conscientious reasons to believe a jury would enlighten them.

The cases, where there is the disposition to send questions of Equity to Law, to be tried in the progress of an equity suit, are much less usual in our practice than in England. They are left more to the good sense of our tribunals. The necessity of expediting business, and the fact which every body knows, that a Court of enlightened judges is not only as competent, but more competent to settle questions arising under the construction of a patent, so often mixed of law and facts, (for there is hardly a question that is not mixed of law and facts arising under a patent,) a combination of them leads Courts not uselessly to send patents to law, to be tried by a jury.

II. There is not a single question of fact in the case we have said, on which the Court can feel the least doubt. We assert that Goodyear is the first man upon whose mind the idea ever flashed, or to whose intelligence the fact ever was disclosed, that by carrying heat to a certain height it would cease to render plastic the India rubber, and begin to harden and metallize it. If there is a man in the world who found out that fact before Goodyear, Who is he? Where is he? On what continent does he live? Who has heard of him? What books treat of him? What man among all the men on earth has seen him, known him, or named him? Yet it is certain that this discovery has been made. It is certain that it exists. It is certain that it is now a matter of common knowledge all over the civilized world. It is certain that

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ten or twelve years ago it was not knowledge. It is certain that this curious result has grown into knowledge by somebody's discovery and invention. And who is that somebody? If Goodyear did not make this discovery, who did make it? Who did make it? If the other side had endeavoured to prove that some one other than Mr. Goodyear had made this discovery, that would have been fair. But they do not meet Goodyear's claim by setting up a distinct claim of any body else. They attempt to prove that Goodyear was not the inventor, by little shreds and patches of testimony. Here a little bit of sulphur, and there a little parcel of lead; here a little degree of heat, a little hotter than would warm a man's hands, and in which a man could live for ten minutes or a quarter of an hour; and yet they never came to the point.

There are birds which fly in the air, seldom lighting, but often hovering. Now this is a question not to be hovered over, not to be brooded over, and not to be dealt with as an infinitesimal quantity of small things. It is a case calling for a manly admission and a manly defence. I ask again, if there is any body else than Goodyear who made this invention, who is he? Is the discovery so plain that it might have come about by accident? It is likely to work important changes in the arts every where. *It introduces quite a new material into the manufacture of the arts, that material being nothing less than elastic metal.* It is hard like metal, and as elastic, as pure original gum elastic. It is as great and momentous a phenomenon occurring to men in the progress of their knowledge, as it would be for a man to show that iron and gold could remain iron and gold, and yet

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For the Injunction.

become elastic like India Rubber. It would be just such another result. Now, this fact cannot be denied; it cannot be secreted; it cannot be kept out of sight; somebody has made this invention. That is certain. Who is he? There is not in the world a human being that can stand up, and say that it is his invention, except the man who is sitting at that table. The learned counsel may prove that A. made a part, and B. made a part, and C. made a part, but A., B., C., and D., and all the rest of the alphabet disclaim this as their invention.

I say, therefore, at this hour in which I have the honour to be speaking to this Court, that there is not a man on the foot-stool who pretends this is his invention but one—not a man. Is that not enough? The invention exists. Every body knows and understands it, and every body connected in former times with the manufacture of India Rubber has been astonished and surprised at it. There have been many respectable witnesses in this case, and the best and most intelligent of them say, after having been engaged in attempts in this manufacture for years and years, losing their time and fortunes, they never heard of or imagined any such thing, as the vulcanization of rubber until Goodyear's invention was made.

The Court's Opinion. September 28, 1852. 1st Point.

Grier, J. It is true that in England the Chancellor will generally not grant a final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal; it is a practice founded more on convenience than necessity. It always rests on the sound discretion of the Court. A

trial at law is ordered by a Chancellor to inform his conscience; not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact, or of legal titles. In the courts of the United States, the practice is by no means so general as in England, or as it would be here, if the trouble of trying issues at law devolved upon a different court.

Cases involving inquiries into the most complex and difficult questions of mechanics and philosophy, are becoming numerous in the courts. Often questions of originality, and infringement of patents, do not depend so much on the credibility of witnesses or the weight of oral testimony, as on the application of principles of science and law to admitted facts. It is true, that in matters of opinion, both mechanics and learned professors will differ widely. But still the question is not to be decided by the number, credibility, or respectability, of such witnesses; but by the force and weight of the reasons given for their respective opinions. It is no reflection on trial by jury to say, that cases frequently occur, in which ten out of twelve jurors do not understand the principles of science, mathematics, or philosophy, necessary to a correct judgment of the case. Besides, much of the time of the courts is lost, where twelve men will not agree upon any verdict; or when they have agreed, the conscience of the Chancellor, instead of feeling enlightened, rejects it altogether.

A select or special jury of philosophers, if they could be got, would perhaps not prove more satisfactory or obviate the difficulty. In a late case involving the validity of Morse's telegraph patents, which was heard in Philadelphia, a final injunction was decreed

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without a verdict to establish the patents; and many other cases might be cited from other circuits, if necessary, in support of this practice, showing that the courts of the United States do not always consider it a proper exercise of their discretion to order such issues to be tried at law, before granting a final injunction.

In the present case there are many reasons why the Court will not thus exercise their discretion:

1st. Because this case has been set down for final hearing on the exhibits and proofs, without any motion or order of the Court for such an issue.

2d. After a patient hearing of very able counsel, and a careful consideration of the testimony, the Court feel no doubt or difficulty on these questions, which would be removed or confirmed by a verdict.

3d. It would require three or four weeks at least, to try this case before a jury, if this library of testimony were read to them; and at least as many months, if the witnesses were examined *viva voce*, as they probably would be; and, after all this expenditure of time and labour, it is even more than probable, that from the confusion created by the great length of the testimony and argument in court, or the force and effect of those urged from without, no verdict would be obtained, and most certainly none that would alter the present conviction of the Court.

Without requiring the aid of a jury, we shall therefore proceed to examine the questions both of fact and law, which affect the validity of the complainant's patents. [After doing this, the Court concluded with the following remarks.]

The testimony shows that many persons had made experiments—that they had used sulphur, lead, and

heat, before Goodyear's patents, and probably, before his discovery. But to what purpose? Their experiments ended in discovering nothing, except, perhaps, that they had ruined themselves. The great difference between them and Goodyear is, that he persisted in his experiments, and finally succeeded in perfecting a valuable discovery, and they failed. It is usually the case, when any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to that subject previously; and that many persons have been making researches and experiments. Philosophers and mechanicians may have, in some measure, anticipated, in their speculation, the possibility or probability of such discovery or invention; many experiments may have been unsuccessfully tried, coming very near, yet falling short of the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating point of many experiments, not only by the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others; but it gives them no right to claim a share of the honour or the profit of the successful inventor. It is when speculation has been reduced to practice, when experiment has resulted in discovery, and when that discovery has been perfected by patient and continued experiments—when some new compound, art, manufacture, or machine, has been thus produced, which is useful to the public, that the party making it becomes a public benefactor, and entitled to a patent.

And yet when genius and patient perseverance have at length succeeded, in spite of sneers and scoffs,

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THE COURT'S OPINION. 2d Point.

in perfecting some valuable invention or discovery, how seldom is it followed by reward! Envy robs him of the honour, while speculators, swindlers, and pirates, rob him of the profits. Every unsuccessful experimenter who did, or did not, come very near making the discovery, now claims it. Every one who can invent an improvement, or vary its form, claims a right to pirate the original discovery. We need not summon Morse, or Blanchard, or Woodworth, to prove that this is the usual history of every great discovery or invention.

The present case adds another chapter to this long and uniform history. But notwithstanding the indomitable energy and perseverance with which this attempt to invalidate the patent has been pursued, the volumes of testimony with which it is oppressed, and the great ability with which it has been canvassed in the argument, we are of opinion that the defendant has signally failed in the attempt to show that himself or any other person discovered and perfected the process of manufacturing vulcanized India rubber before Goodyear. We shall give therefore our

DECREE OF PERPETUAL INJUNCTION.

[AT TRENTON.]

GIRARD'S HEIRS V. THE CITY OF PHILADELPHIA.

[DEVISE OF AFTER-ACQUIRED LANDS: ATTRACTION OF TITLES.]

It being admitted that a devise of real estate to which, *at the date of the devise*, the testator had not a good title; but of which nevertheless he had an actual, notorious and continuing possession, and one that by time might have ripened into title, and under which possession and pretence of title he claimed entire ownership, do not carry the estate as real estate owned at the date of the will; the Court here further decides that *a good title* acquired *subsequently* to the date of the devise, will not be attracted nor cohere to the old claim or imperfect interest, so as to be merged, or extinguished in it, and so to pass the estate as real estate acquired *previously* to the date of the will. Payment of taxes for even more than 21 years, without an adverse possession during that length of time, gives no colour of title; though it defines extent of claim. And so an entry to run lines, &c.

Ap'l Sessions, 1853.

Statement.

Nicholson being the owner of 11 tracts of wild land, mortgaged them in 1797 to the Bank of the United States. The bank afterwards bought them in under this mortgage, and in February, 1830, its trustees sold them to Girard, who took deeds describing the tracts in the ordinary way. By his will, made *afterwards*, Girard left all his real estate to the defendants, the City of Philadelphia, and by a codicil made in June, 1831, and *before* the date of another deed to him hereafter mentioned, devised in the same way all the estate he should thereafter purchase; a matter, however, which as the law of Pennsylvania was afterwards judicially declared to have always been, he had no power effectively to do.

Prior to the mortgage by Nicholson, the State of Pennsylvania, which was a creditor of his, passed a law which, as was determined in 1833, by the Supreme Court of the United States,* after a great deal of litigation by the parties to the suit, gave that commonwealth a continuing lien, and under this lien the State of Pennsylvania sold this same property to this

* Lessee of Livingston v. Moore, 7 Peters, 469.

Ap'l Sessions, 1853.

Statement.

same Girard, in September, 1831, sometime *after* the execution of his will and codicil, leaving his real estate to the City. Girard had thus two deeds for the same property; the earliest one from the trustees of the Bank of the United States, the other from the State of Pennsylvania. This last one contained, along with its terms of "bargain and sell," the terms "*grant*, remise, *release*, quit claim," &c.

Until shortly before this last deed, Girard supposed his first deed gave him a good title. He paid a full price. He was the unquestioned owner of 57 other tracts adjoining these 11, and with them constituting one body of land. After the purchase from the bank of these last, he sent an agent to look after the whole body; had all the outer lines carefully run, and some of the interior ones, and built saw mills and small houses on different spots on the 68 tracts, which his tenants constantly occupied for nineteen years. His agent went over each and every tract, including these 11, and protected the whole, which were treated as one body, from trespassers. Girard notoriously paid the taxes for more than 21 years, and was at other expenses up to the time of this trial in October, 1852.

It having been decided by the Supreme Court of Pennsylvania,* that a devise of subsequently acquired lands passed nothing, Girard's heirs at law, represented here by Messrs. *J. M. Read*, *Cuyler*, and *Guillou*, now brought this ejectment, claiming that as Girard's only real title, was acquired after the date of his will and codicil, the lands belonged to them; while Mr. *Cadwalader* and the City Solicitor (*Olmsted*) for the City, admitting the correctness of the doctrine, that after-acquired lands cannot (independent of a statute) be made to pass by will, propounded the following

* Girard v. Vidal, 4 Rawle, 335.

propositions as sufficient to defeat the claim of the heirs.

For the City.

That surveys of large bodies of land are good where the exterior lines only are run and marked on the ground.*

That actual possession of part of a tract under colour of title to all the land within defined and marked boundaries, gives constructive possession to the whole, although the unenclosed part is within the bounds of an elder and better survey.†

That an entry on two adjoining lots under a deed is presumed to be in accordance therewith, and makes the actual possession co-tensive with the boundaries mentioned in the deed.‡

That all contingent possible estates are devisable, for there is an interest.§

That independently of the proof of actual possession taken and held by the defendant's testator, the plaintiffs, claiming under him, are estopped from denying that the bargain and sale from the trustees of the Bank of the United States, vested in him the possession from the date of its delivery.‖

That a party thus in possession with colour of title, is capable of receiving a release of the fee from any holder of an adverse title.¶

That conveyances like these to the defendant's testator, made after the date of his will on which the plaintiffs rely to establish their present claim, enure by way of release, or otherwise as may best promote the grantee's interest.**

As to any question between parties claiming as heirs, devisees, or in any other manner as mere volunteers, they *enure as an extinguishment of the adverse*

* Stevens v. Hughes, 3 Watts & Sergeant, 465; Schnabel v. Doughty, 3 Barr, 392; Mock v. Astley, 13 Sergeant & Rawle, 382.

† Heiser v. Riehle, 7 Watts, 35; Waggoner v. Hastings, 5 Barr, 300; Kite v. Brown, 5 Id. 291; Siegle v. Louderbaugh, 5 Id. 490.

‡ Hopkins v. Robinson, 3 Watts, 205.

§ 4 Kent's Commentaries, 511.

‖ Hargrave's Notes Coke Littleton, 273; Coke Littleton, p. 275-6, 566; Leblyn v. Slack, Bridgman, 495, in mar.; Iseham v. Morrice, 6th Resolution, Croke Charles, 110.

¶ Littleton, § 469, and Coke Littleton, 275, a; Lampet's Case, 10 Rep. 47, a; Bradstreet v. Huntington, 5 Peters, 434.

** Coke Littleton, 301 b; Chester v. Willon, Siderfin, 452; S. C. Ventris, 78; and see Jackson v. Smith, 13 Johnson, 406.

Ap'l Sessions, 1853.

For the City.

right of the parties conveying, so as to prevent the question, *which was the better right* from afterwards arising. Brook,* says, "Abator or disseisor aliens the land in mortmain by license, and afterwards he who has a right releases to the abbot in fee, the lord cannot enter, *per Norton;* forasmuch as the tenant is in by the first fee or license, therefore the release to him who is in by title goes by *extinguishment of the right.*" Coke Littleton is to the same point.† Release, per mittre le droit, "in some respects enures by way of extinguishment."

* Abridgment, tit. Mortmain, pl. 38.

† 275 a.

The acceptance of such a release is not a revocation of a prior devise by the release. (1). It has never been held or judicially said, that a devise was revoked by the acceptance of a conveyance, capable of enuring as a mere release of the right of the grantor. (2). There is no case in which a devise has been held to be revoked by an alteration of the devisor's estate, where he has not himself *done an act* divesting himself of the estate. (3). There is no case in which the heir alleging that his ancestor's devise was inoperative, has been allowed to call any act of such ancestor in question, or dispute any title of which such ancestor may have claimed to be the holder.‡ (4). If express authorities were required, that it is not a revocation, or that the heir cannot set it up in derogation of his ancestor's prior title, they are found in *Jackson* v. *Ireland*,§ in New York, and in the old books which show that revocations by alteration of a devisor's estate, where not a question of capacity, is a question of mere intention. And that in the case of a conveyance to such uses as had been declared by the grantor's prior devise, the devise is a

‡ Goodtitle v. Otway, 2 Henry Blackstone, 516.

§ 3 Wendell, 99.

good appointment of the use to prevent an escheat, and therefore to bar an heir.*

The rule on the subject is the same at law and equity, and is that a subsequent conveyance does not revoke a prior devise, unless the testator's *estate* (*not right*) has been materially modified.†

For the City.

* Skerrett v. Burd, 1 Wharton, 250; Rolle's Abridgment, 616, Devise Q, pl. 3, 6 Edward VI.; Dyer, 143 a & b; Winkfield's Case, Godbolt, 132, pl. 152; Gibson v. Mutess, Owen, 76; Gybson v. Platless, Goldsborough, 32; Hussey's Case, Moore, 789; Mitton v. Lutwich, W. Jones, 7.

† Parsons v. Freeman, 3 Atkyns, 748; Brydges v. Chandos, 2 Vesey, Jr., 425-431; Harmood v. Oglander, 6 Id. 222; Jones v. Hartley, 2 Wharton, 103.

The Court's Opinion.

Grier, J. The reason why after-purchased lands do not pass by a will, even though the testator has expressed clearly his wish or intention that they should, is not because such a purchase is a revocation of the will, but because a will is in the nature of a conveyance or an appointment of a particular estate, and consequently the testator must have the power to dispose at the time the will is executed. Hence a devise of land, though it operates in future, can pass only such interest or estate as the testator had at the time, and continued to have till his decease. Like a grant of all a man's estate and interest without warranty or covenant of title, it is no estoppel against the grantor or his heir.

Thus, if a man having an equitable estate in land, devise it, and afterwards purchase the legal title, the latter will descend to his heir; but equity will hold him as a trustee for the devisee of the equitable or usufructuary estate. On the contrary, if the testator have but the legal estate at the time he makes his will, and afterwards purchases the equitable estate, the devisee of the legal estate will be held as trustee for the heir to whom the after-purchased equitable estate descends. There is no extinguishment of the after-purchased title for the sake of enlarging the devise, and the heir is not stopped from averring that the devisee took just such estate or title as the testator

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The Court's Opinion.

had at the date of the execution of his will. Nor can the distinction taken by the counsel of the city between title and estate avail to establish a difference in the present case. A man who has neither possession nor right, has no estate in the land. He who has nothing can convey nothing. It is true that a void deed, which conveys no estate, may be used by one in possession as colour of title and evidence of the extent of his claim, while his whole estate in the land is no more than a naked or tortious possession. It is true also, that by the ancient feudal doctrine of disseisin, a person who has ousted the owner is treated as tenant of the freehold. A disseisin was considered not only as a dispossession of the freeholder, but also as a substitution of the disseisor as tenant to the lord, as one of the *pares curiæ*. But, though some of the consequences of actual disseisin continue to be law in England, yet Lord Mansfield admits that in his day very little was known of *seisin* or *disseisin* but the name. In Pennsylvania, where property is allodial, it is still less known or applied, except in its analogies as connected with the statute of limitations and adverse possessions. In England, till lately, the disseisee could not dispose of the land by will or otherwise, and descent cast takes away his right of entry. But such has never been the law in Pennsylvania.* One in possession without right, or merely by disseisin, is considered as "*having a something which may be transferred*," a naked possession which may ripen into a title by the statute of limitations. But until it has done so, neither his heir nor alienee is in possession *by title*, tolling the entry of the disseisee or owner. By the feudal law of disseisin, the heir of the disseisor, or his alienee by feoffment, with

* Overfield v. Christie, 7 Sergeant & Rawle, 177; Humes v. McFarlane, 4 Id. 435, and McCall v. Neely, 3 Watts, 71.

livery of seisin, is in actual possession with title, and the disseissee having lost the right of entry, has but a bare right. Whether a release by such a disseisee after devise, would be construed to operate by way of enlargement of the devisee's estate or extinguishment of that of the disseisee, we need not inquire. No case has been brought to our notice containing such a doctrine. But a release from disseisee to disseisor, is in fact the creation of a new estate, being equivalent to an entry and feoffment, and could not be construed to operate by way of extinguishment.

But it is unnecessary to trouble ourselves with these antiquated and obscure doctrines; for, admitting all the consequences claimed from them, they have no application to this case.

1st. Because neither the trustees, nor Girard, under their quit claim deed, had any actual seisin: they had neither possession nor right of possession. The title and estate of the bank was divested by the commissioner's sales, under the Nicholson lien; and the purchasers had the title and the actual possession, or if the land remains vacant, the law cast on them the possession. The trustees were not disseisors, nor was Girard enfeoffed by them with livery of seisin. And though a deed of bargain and sale may be equivalent to such a feoffment, yet where the bargainor had neither possession nor title, no seisin by right or by wrong, his deed could confer no seisin or estate whatsoever on the bargainor.

2nd. The acts of Girard, relied on as giving title, giving the testimony its utmost effect, did not amount to an ouster or disseisin of the owners whether in actual or legal possession. A mere entry upon another is no disseisin, unless it be accompanied with

Ap'l Sessions, 1853.

The Court's Opinion.

expulsion. An estate by disseisin is got by wrong and injury; and the rightful owner must be expelled either by violence or some act which the law regards as equivalent in its effects.*

*Doe v. Thompson, 5 Cowen, 371.

Girard had, therefore, no seisin, no estate, or freehold by right or by wrong, on which a release could operate by way of enlargement, confirmation or extinguishment. His vendor having neither possession nor right could convey nothing to him by his deed. At the time the codicil was executed Girard had no estate which he could convey by grant or devise. The conveyance, subsequent to the codicil, conferred a new and independent title—gave him seisin and right to, or estate in, the land. Then for the first time he became owner of the lands, and had power to convey them.

The proposition which the counsel for the devisees must substantiate, under the facts in this case, must be this: That a man who has purchased a pretended title to land where his vendor had neither possession nor right, and who afterwards purchases from the true owner, and thus becomes seised and possessed, is estopped to deny that he claims by the pretended and worthless title; that this estoppel descends to his heir, and that the good title becomes merged in the bad one, and that in order to assist the devisee as against the heir at law, equity will construe the good conveyance by which alone the grantee has any seisin, estate or title, to be a mere extinguishment of an outstanding claim or cloud on the title. This doctrine cannot be supported by analogy of authority in ancient or modern law.

The case cited from Brooke gives no countenance to such doctrine. For where an abator or disseisor

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aliens in mortmain by license of the king and lord paramount, and disseisee releases the right to the abbot, it must be observed that the abbot being alienee by livery of seisin of the disseisor, is in possession of the freehold by *title*. And the entry and feoffment being by license are sufficient to pass the freehold to the abbot as against the king and lord paramount, and all the world except him who hath the right. But his right of entry being tolled, his release, which is of the bare right, will be construed to operate only as extinguishment of his right, and not to the destruction of the estate so as to countervail *entry and feoffment by license*. Hence the distinction taken "where the abbot himself is disseisor and the king or lord releases, and confirms to him, and *then* the disseisee releases the abbot. In such case, it seems that the king or lord can enter, for this countervails entry and feoffment, and then there is a new mortmain." In this case the abbot being himself disseisor is not in by title or livery of seisin; the entry of the disseisee is not tolled; his release operates as a feoffment with livery of seisin and confers a new freehold or estate on the disseisee, which being without license is forfeited as mortmain.

It needs no argument to show that these cases, sought out from the lumber garrets of obsolete feudal laws, will afford no analogy or authority for the proposition which the defendants are compelled to establish, in order to success. The principles laid down by the Supreme Court of Pennsylvania in their construction of this devise,* overrule the positions advanced by defendants and leave their case without a foundation on which to rest. It is there decided, that "the question whether after-purchased lands pass by

*Girard v. The City of Philadelphia, 4 Rawle, 335.

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The Court's Opinion.

a previous devise, does not depend on the intention of the testator: that a will is a species of conveyance, and operates only as regards the disposing power and capacity of the testator at the time of its execution, insomuch as to require his power over the estate to be perfect at the time: that the act of disposition must be complete in every respect at the performance of it: that a testator, like any other grantor, cannot give what he has not; and finally, *that a subsequent purchase giving the land to the testator, is repugnant to the import of the devise which would give it to the devisee, and therefore not to be intended to have been in subservience to the will.*"

These principles rule this case. Girard, by the purchase and completion of this title, defeated and put an end to the uncertain possessor's estate, or right held by him at the time of his devise. No case can be found where the purchase of a fee simple estate after a devise, has been held in subservience to the object of the will, because at the time of making it, the testator had some worthless or pretended claim to it. The law favours the heir at law, and has devised no fictitious extinguishment or estoppel to bar his claim as against the pretended or doubtful claims of the devisee.

JUDGMENT FOR PLAINTIFF.

[OCTOBER SESSIONS, 1850, NO. 31, COMMON LAW DOCKET.]

VAN METRE V. MITCHELL.

OLIVER V. WEAKLEY ET AL.

['HARBOURING' AND 'CONCEALING' WITHIN THE ACT OF CONGRESS OF THE 12TH FEBRUARY, 1793.]

[ACTION OF DEBT FOR PENALTY, AS DISTINGUISHED FROM ONE ON THE CASE.]

A law of Congress enacts, that if any person shall *harbour or conceal* a fugitive from labour after *notice* that he or she is so, such person *shall forfeit and pay* $500 to be recovered by action of debt; *saving moreover* to the owner of such fugitive *a right of action on account of the injuries, &c.*

Notice here means knowledge: and harbouring means entertaining or sheltering a fugitive with the purpose of encouraging him in his desertion of his master; with the purpose to further his escape, and to impede and frustrate the master's reclamation of him. 'Harbouring' is not here synonymous with 'concealing' used in the same phrase with it: and there may be harbouring without any concealment.

Under this act, if the plaintiff sues in debt for the penalty of $500, which it gives for illegally harbouring and concealing, he may recover it upon proof of such harbouring or concealment, irrespectively of any proof of actual damage to himself. But if he brings case 'on account of the injuries,' for which the act saves a right of action, he can recover only to the amount of actual damage, which he shows he has suffered.

The Court makes some remarks upon conscience, and declares perverse conscience to be no excuse for violating the laws of the land.

THE Constitution of the United States declares,* that "no person held to service or labour in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such labour or service, but shall be delivered up on claim of the party to whom such service or labour may be due:"† and a law of Congress, passed to give effect to the provision of the Constitution, enacts that when a person held to labour in any one of the United States, shall escape into any other of them, the person to whom such labour is

OCT'R SESSIONS, 1853.

STATEMENT.

* Art. iv. § 3.

† February 12th, 1793, §§ 3 and .

Oc'r Sessions, 1853.

Statement.

* § 4.

due, or his agent, may seize or arrest him or her. It then prescribes a mode in which the reclamation is to be made, and enacts,* that any person who shall knowingly and willingly obstruct or hinder such claimant in so seizing or arresting such fugitive, or shall rescue the fugitive when so arrested, or shall *harbour or conceal* such person after *notice*, that he or she was a fugitive from labour, shall, for either of the said offences, *forfeit and pay the sum of* $500 to be recovered by action of debt; *saving moreover to the person claiming such labour or service his right of action, for or on account of the said injuries, or either of them.*

Under this statute two suits of different plaintiffs and defendants were tried in this circuit; one, some time since, of debt for the penalty of $500; the other, some terms ago; now tried a second time, the jury not having agreed on the former trial, an action on the case, on account of the injuries for which the last clause above quoted saves a right of action. Both cases and all three trials are reported here in connection. In the first case,

Statement in Van Metre v. Mitchell.

Van Metre v. *Mitchell*,

the negro Jared and another negro ran away from their master in Virginia, and came without stopping to the defendant Mitchell, in the town of Indiana, and county of that name, in Pennsylvania. Why they made their way *to that place*, or by whom they were directed to make application to the defendant, did not appear. But there, as in a few other parts of Pennsylvania, it was matter of common knowledge—though not perhaps capable of the *clearest* proof—that fanatics, "friends of humanity," were

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Statement in Van Metre v. Mitchell.

banded together under professions of conscience and philanthropy, and vows of propagandism to disregard the Constitution and laws of the country, which secure to our Southern citizens a right to follow and reclaim their runaway slaves. A regularly organized association existed there, as in some other places, to entice negroes from their owners, and to aid them in escaping to the North. And there was a good deal of evidence to prove the connection of the defendant with these persons. He appeared, if the evidence against him was true, to be a 'Philanthropist' by distinction, 'a Friend of the Black Man.' He discoursed intemperately against Southern planters as kidnappers, dealers in human flesh, monsters in men's form, and emissaries of hell. When a Southern planter came to Indiana to see if his slaves were there, Mitchell gave out to black people that 'Indians were abroad:' and paid the negroes in his employ their wages forthwith. When requested by a supposed agent of an owner for leave to visit his farm, leave was granted only on condition that he would not molest any man of colour upon it. He cautioned persons—such supposed agents—to be careful how they interfered with any negroes in Indiana, as they were armed, had guns and knives, and were able to take care of themselves, and most likely would fight. When one of them was arrested, and the defendant was asked about the others, and if they had best leave the place, he said that they had been apprised of their danger that evening, and were safe: that they were safe where they were, being armed. On one occasion he had a meeting of 'Friends of the Black Man,' in his house, a runaway negro being secreted in a back room; and a committee was ap-

Oct Sessions, 1853.

Statement in Van Metre v. Mitchell.

pointed to *protect and counsel* the fugitives, and to have them paid their wages whenever necessary.

When Jared and his companions arrived at Indiana, the defendant sent them with a letter to his tenant residing on his farm, about nine miles from town. They were directed to take possession of a vacant house on the defendant's farm, and were furnished with bedding, cooking utensils, grain, a cow, and axes. They were employed by the defendant to labour on his farm in making fences and otherwise, and also hired themselves to work for the neighbours. The defendant gave them money with which they bought ammunition and gun caps, and they had guns and dirks. They remained in the defendant's house in this way about four months: and the defendant *well knew that they were fugitive slaves, and that Van Metre, the plaintiff, owned them.* But no *notice*, that is to say no formal or specific *notice*, was ever given by the plaintiff to the defendant of that fact.

It was well known to people in the town of Indiana, and in the neighbourhood of it, that these slaves were on Mitchell's farm: and except that he once asked a partner of his, who had a saw mill some distance from town, if he could not find employment for the negroes at this mill, alleging as a motive, "that they would be *out of the way if they were there*"—there was no evidence that Mitchell desired to conceal their place of retreat, or made any secret about it.

Two counts of the declaration charged the defendant with 'harbouring *and* concealing;' two others with 'harbouring.'

For the Defendant.

For the Defendant. On the two counts which

Oc'r Sessions, 1853.

For the Defendant.

allege 'harbouring and concealing,' there can be no recovery. Admitting, here, for the sake of argument, that there has been a 'harbouring,' there was no 'concealing' with it. The proof shows rather an avowed, concerted and systematic defiance of law. Certainly whatever was done was without concealment. If there was a previous conspiracy to make a general and public resistance to the law, that is treason, and the offence is to be proceeded with under a different statute and with a different penalty.

Then as to the next two counts which allege 'harbouring' only, Dr. Webster, whose Dictionary is at least authority to show how words are used in *America*, gives the word 'secrete' as a definition of the word 'harbour.' The Act of Congress, itself, seems to use 'conceal' as synonymous with harbouring, or at least as explanatory of it. The language is not, shall "*either* conceal *or* harbour." Bouvier, in his '*American* Law Dictionary' defines harbour "to receive *clandestinely* and without lawful authority a person *for the purpose* of concealing him; *so that* another, having a right to the lawful custody of such person *shall be deprived of the same.*" There must, then, be a reception 'clandestinely;' that is, "secretly, privately; in private, in secret;"* and such reception, must have both a certain purpose and a certain result.

* Dr. Johnson.

II. There was no *notice* here. If the omission referred to of the word 'either,' is thought unimportant because the language of the act is precise, certainly the use of 'notice' instead of 'knowledge' is important. In law, 'knowledge' is not 'notice.' This has been decided in regard to an indorser.

III. The whole legislation on the subject of slavery

O. T. Sessions, 1853.

For the Defendant.

is in derogation of human liberty. It is against the spirit of the common law. Slavery—that horrid inheritance fastened upon our country by the rapacity and oppression of our French and British ancestry—is an institution local merely. Pennsylvania had scarcely roused herself to independence before she made her great 'Act' for its gradual abolition and proclaimed in memorable words her deep sense of its sin and shame.(A) This Court will not strain lan-

(A) See Preamble to "An Act of 1st March, 1780, for the Gradual Abolition of Slavery," as follows:—

I. When we contemplate our abhorrence of that condition, to which the arms and tyranny of Great Britain were exerted to reduce us, when we look back on the variety of dangers to which we have been exposed, and how miraculously our wants in many instances have been supplied and our deliverances wrought, when even hope and human fortitude have become unequal to the conflict, we are unavoidably led to a serious and grateful sense of the manifold blessings which we have undeservedly received from the hand of that Being, from whom every good and perfect gift cometh. Impressed with these ideas, we conceive that it is our duty, and we rejoice that it is in our power to extend a portion of that freedom to others which hath been extended to us, and release from that state of thraldom, to which we ourselves were tyrannically doomed, and from which we have now every prospect of being delivered. It is not for us to inquire why, in the creation of mankind, the inhabitants of the several parts of the earth were distinguished by a difference in feature or complexion. It is sufficient to know that all are the work of an Almighty hand. We find, in the distribution of the human species, that the most fertile, as well as the most barren parts of the earth are inhabited by men of complexions different from ours and from each other; from whence we may reasonably, as well as religiously infer, that He, who placed them in their various situations, hath extended equally his care and protection to them all, and that it becometh us not to counteract his mercies. We esteem it a peculiar blessing granted to us, that we are enabled this day to add one more step to universal civilization, by removing, as much as possible, the sorrows of those, who have lived in undeserved bondage, and from which, by the assumed authority of the kings of Great Britain, no effectual, legal relief could be obtained. Weaned, by a long course of experience, from those narrow prejudices and partialities we had imbibed, we find our hearts enlarged with kindness and benevolence towards men of all conditions and nations; and we conceive ourselves at this particular period extraordinarily called upon, by the blessings which we have received, to manifest the sincerity of our profession, and to give a substantial proof of our gratitude.

II. And whereas the condition of those persons, who have heretofore been denominated Negro and Mulatto slaves, has been attended with circumstances, which not only deprived them of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separa-

guage to remand that captive who has sought refuge on its soil, nor help again to rivet on his poor limbs the manacles that have once fallen to the ground. It will not strain language to harden the heart of humanity, nor to offend the scrupulous, perhaps the over-sensitive Conscience which teaches our weaker brethren that slavery is sin.

Oc'r Sessions, 1858.

For the Defendant.

GRIER, J.—The meaning of the word 'notice' as used in this act, has been settled, and is not now open for discussion. It means knowledge. A specific notice either written or parol, need not be given. It is enough if the defendant knows that the person he is harbouring is a fugitive from labour.*

THE COURT'S OPINION.

II. The word 'harbour' is defined by Dr. Johnson and other lexicographers, 'to entertain,' 'to permit to reside,' 'to shelter,' 'to secure;' and Dr. Webster adds, 'to secrete.' It has various shades of meaning not exactly defined by any synonyme. Mr. Bouvier's definition cited and relied on at the bar, is quoted in the opinion of the Supreme Court already referred to, but without the intention of affirming either the authority of Mr. Bouvier's Law Dictionary, or the correctness of the definition. For although the word may be used in the complete meaning there given to it, it does not follow that all these conditions are necessary elements in its definition. 'Receiving and entertaining a person clandestinely, and for the pur-

* Jones v. Van Zandt, 5 Howard, 215-225.

tion and sale of husband and wife from each other and from their children, an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case. In justice, therefore, to persons so unhappily circumstanced and who, having no prospect before them whereon they may rest their sorrows and their hopes, have no reasonable inducement to render their service to society, which they otherwise might, and also in grateful commemoration of our own happy deliverance from that state of unconditional submission, to which we were doomed by the tyranny of Britain.

Oc'r Sessions, 1853.

THE COURT'S OPINION.

pose of concealment,' may well be called 'harbouring,' as the word is sometimes used. Yet one may harbour without concealing. He may afford entertainment, lodging and shelter to vagabonds, gamblers and thieves, without a purpose or attempt at concealment, and yet it may be correctly affirmed of him, that he 'harbours' them.

The Act of Congress, by using the terms 'harbour or conceal,' assumed, I think, that the terms are not synonymous, and that there might be a harbouring without concealment. The act seems to be drawn with great care and accuracy, and bears no marks of that slovenly diction which sometimes characterizes acts of Assembly, where numerous synonymes are heaped together, and words are multiplied only to increase confusion and obscurity. But neither in legal use, nor in common parlance, is the word 'harbour' precisely defined by the words entertain or shelter, given by Dr. Johnson as two of its meanings. It implies impropriety in the conduct of the person giving the entertainment or shelter in consequence of some imputations on the character of the person who receives it. An innkeeper is said to *entertain* travellers and strangers, not to *harbour* them; but may be accused of *harbouring* vagabonds, deserters, fugitives or thieves; persons whom he ought not to *entertain*.

The Act of Congress does not intend to make common charity a crime, or treat that man as guilty of an offence against his neighbour, who merely furnishes food, lodging or raiment to the hungry, weary or naked wanderer, though he be an apprentice or a slave. On the contrary, it contemplates not only an escape of the slave, but the intention of the master to reclaim him. It points out the mode in which

Oc'r Sessions, 1853.

THE COURT'S OPINION.

this reclamation is to be made, and it is for an unlawful interference or hinderance of this right of reclamation, secured to the master by the Constitution and laws, that this action is given.

The harbouring made criminal by this act, then, requires some other ingredient besides a mere kindness, or charity rendered to the fugitive. The intention or purpose which accompanies the act, must be to encourage the fugitive in his desertion of his master, to further his escape, and impede and frustrate his reclamation. "The act must evince an intention to elude the vigilance of the master, and be calculated to obtain the object."*

* 2 McLean, 608.

I can imagine a harbouring of slaves, without any affectation of concealment, which might be as injurious to the master, and as effective in promoting the escape of the slave, and frustrating the vigilance of the master. If a man should furnish a house in the woods as a rendezvous for fugitive slaves, encourage them in remaining there, and in enticing others to join them, should countenance and assist them with the means of resistance to their recaption, and furnish them information of pursuit, in order to further their escape, or prepare them to resist; such a harbouring might be as injurious to the master, and is as fully within the meaning of the statute, as if the fugitives had been concealed. Such protection might be made more efficacious in enabling them to elude the vigilance of their master, than any attempt to conceal them. What amounts to concealment, also, may depend much on circumstances. It does not necessarily require that the subject of it be secreted in a garret or a cellar, a barn or a covered wagon. The highways of a remote and uncultivated county like

Oc'r Sessions, 1853.

THE COURT'S OPINION.

Indiana may be better places of concealment than the by-ways of many other places; and the limits of the whole county as good a place to secrete fugitives from a distant State, as any that may be imagined, especially if the fugitives have a committee of sympathisers to watch over their interests, and give them warning of the approach of danger.

But assuming that the evidence is not sufficient to establish the charge of harbouring *and* concealing. Inquire, then, whether shelter and entertainment was afforded to the fugitives, for the purpose and with the effect of encouraging them in the desertion of their master, and furthering their escape, and to impede or frustrate their arrest.

Look at the conduct and declarations of the defendant. Does he furnish a place of rendezvous or a harbour, not only for the fugitive in question, but for all whom they can entice to leave their masters? Is he the confidant of their schemes for rescuing other slaves, or enticing them to escape? and when they have succeeded, do the new fugitives come immediately to the defendant and proceed to his farm, the bearer of letters from the defendant to his tenant? When he is requested by a supposed agent of the owners to be permitted to see the fugitives on his farm, does he make it a condition of his compliance that he shall not molest them? When there is danger of their reception, does he have information conveyed to them that there are "Indians abroad?" a slang phrase, well understood in the country as a warning to be on their guard, and make their escape. Does he give them money to buy ammunition or gun caps? Does he express his confidence that they are sufficiently armed, and able to

Oc'r Sessions, 1853.

The Court's Opinion.

resist successfully any force sent to arrest them; that they have a gun, dirk and axes, and know how to use them? When an arrest had been made of one of them, and he is inquired of, as to the safety of the others does he say, "that they had been apprised of their danger that evening, and were safe—that they were safe where they were," and well armed, and therefore there was no reason for concealment or flight? Does he call a meeting at his own house of persons friendly to the fugitives, and have one of them in his back room? At this meeting is a committee appointed to protect and counsel the fugitives; to settle up their wages, that they may escape if threatened with pursuit? Is the defendant, on the next day, engaged in settling with the fugitives through their committee, stating, "there were Indians abroad the night before, and that he would settle up and let them go?"

This *mala mens*, or fraudulent intent required by the act to constitute illegal harbouring, is not to be measured by the religious or political notions of the accused, or the correctness or perversion of his moral perceptions. Some men of disordered understandings or perverted conscience may conceive it a religious duty to break the law, but the law will not tolerate their excuse. If the defendant was connected with any society for the purpose of assisting fugitives from other States to escape from their masters, and in pursuance of such a scheme, afforded this shelter and protection to the fugitive in question, he would be legally liable to the penalty of this act, however much his conscience, or that of his associates, might approve his conduct. With any opinions of the defendant, you have no concern. He may adopt and entertain, as opinions, what-

Oc'r Sessions, 1853.

THE COURT'S OPINION.

ever folly likes him: and as long as these remain opinions, he will go unpunished. He is on trial for his ACTS: and if his opinions, ceasing to be speculative, have ended in conduct, let no morbid sympathy—no *false* respect for pretended "rights of conscience"—prevent either court or jury from judging him justly, without favour as without fear.

"Be careful," says the great casuist Taylor, "that prejudice or passion, fancy or affection, error and illusion, be not mistaken for conscience. Nothing is more usual," he adds, "than to pretend conscience to all the actions of men, which are public, and cannot be concealed. . . . The disobedient refuse to submit to the laws, and they also in many cases pretend conscience:" "and so . . . . disobedience and rebellion are become conscience, in which there is neither knowledge, nor revelation, nor truth, nor charity, nor reason, nor religion." . . . . "What they think is not against conscience, they think or pretend to think it is an effect of conscience: and so their fond persuasions, and fancies are made sacred, and conscience is pretended, and themselves and every man else is abused. . . . They think that some sacredness or authority passes upon their passion or design if they call it conscience." "*Conscience*," he declares in another place, "*is tied to laws*." And he distinguishes between the "right or sure conscience,"—which is right reason reduced to practice and conducting moral actions—from "the perverse conscience" which is seated in the fancy or affections, "a heap of irregular principles and irregular defects, and is the same in conscience as deformity is in the body, or peevishness in the affections." "It is not enough," he says, "that the conscience be taught by nature: but it

Oc'r Sessions, 1853.

THE COURT'S OPINION.

must be taught by God, *conducted by reason*, made operative by discourse, assisted by choice, *instructed by laws and sober principles*, and then it is right, and it may be sure."

He specially considers the class of duties where, in seeking guides to a knowledge of what is obligatory on us, 'lawyers' are to be preferred to 'divines.' While declaring that "all the general measures of justice are the laws of God, and therefore cognizable by the ministers of religion," he adds that as "these general measures like a great river into little streams, are deduced into little rivulets and particularities by the laws and customs, by the sentences and agreements of men, therefore they must slip from the hands of the spiritual man to the prudent and secular. The divine can condemn all injustice, murder, incest, injurious dealing; whether all homicide be murder, all marriage of kindred be incest, or taking that which another man possessed be injustice, must be determined by laws and the learned in them."*

* Ductor Dubitantium, Book 1, ch. 1, rule 3, §§ 1 and 2; ch. 11, rule 1; chap. 1, rule vii. §13; ch. 11, rule 4, §8; chap. iv. rule x. 85.

If you believe from the testimony, that the entertainment and shelter given to the fugitives, were but an exercise of the common principles of humanity, without any intention of encouraging the escape of the fugitive, or impeding or frustrating his recaption or reclamation by his master, or without any act calculated to have that effect, you will find for the defendant.

If, on the contrary, you believe he has afforded shelter and entertainment to the fugitive, to further his escape, and enable him to elude the vigilance of his master, and that his acts were calculated to effect that object, you will find for the plaintiff $500.

VERDICT ACCORDINGLY.

Oc'r Sessions, 1853.

IN THE CASE OF

OLIVER V. WEAKLEY ET AL.

Statement in Oliver v. Weakley.

Which was a suit brought under the same act as the last suit, Oliver, of Maryland, was the owner of certain slaves, who ran away from him, and came like the others into Pennsylvania. He traced his negroes to the defendant's barn: and endeavoured by particular and general evidence to show that this person had harboured and concealed them. But admitting this fact, it rather appeared that *before* they got there, the plaintiff had lost the track of them; that they had already eluded his pursuit, and that although the defendant had harboured or concealed them, this was not the cause of the plaintiff's loss of them.

This suit was not, like the last, for the $500 *penalty*, but an action *on the case* for damages under the last part of the section quoted above: and the declaration contained counts setting forth:

The first. That the defendant well knowing, &c., and contriving and fraudulently intending to deprive the plaintiff of the labour and services due to him by said fugitives, did tortiously and illegally harbour and conceal the said negroes knowing them to be fugitives from labour, and *enticed, persuaded and assisted them to escape from*, and leave the labour and service of the plaintiff, *and obstructed and hindered him from seizing, arresting and recovering said slaves, whereby they were wholly lost to the plaintiff.*

The second. That the defendant illegally enticed, persuaded, procured, *aided and assisted* said negroes *to absent* themselves from, *and wholly to leave and escape the service and labour of plaintiff.*

Oc'r Sessions, 1853.

The third. After stating the ownership and escape of the slaves substantially as in the first, and the right of the plaintiff to pursue and reclaim them, charged that the defendants well knowing the premises, illegally and fraudulently harboured and concealed them *whereby they escaped from the labour, &c.*

Plea, not Guilty.

For the Defendant.

For the Defendants. In this case, and under a declaration such as this is, on the case for damages, we may admit for the sake of argument, and to the fullest extent, the harbouring and concealment made penal by the act of Congress. If the action were for the penalty, the cause of action would be complete when "harbouring" or "concealing" was shown, whatever might be the result of it. But here the gist of the action is in a 'loss' or 'escape,' the *result* of the harbouring or concealment; and the plaintiff recovers nothing unless he shows what his declaration alleges: st. as in the first count, that the defendant "assisted the negroes to escape" "*whereby* they were wholly lost;" OR as in the second count, that the defendant "*aided and assisted*" "the negroes wholly to leave and escape the service," &c.; OR as in the third, that he "harboured and concealed them *whereby* they escaped," &c. The loss or escape must be shown to have been *caused* by the harbouring and concealing; that is, must be shown to be the effect of it.

The Court's Opinion.

GRIER, J., laid down to the jury the meaning of the words 'harbour' and 'notice' as already given, and then continued: This being an action, not of debt, for the penalty of $500, but on the case, and on account of injuries for which the act saves a right of

Oc'r Sessions, 1853.

THE COURT'S OPINION.

action, the plaintiff, on whom lies the burthen of proof, must show that the slaves were lost to him through the illegal interference of the defendants, or that some other appreciable loss, injury or damage was suffered by him in consequence thereof. The difference between the present action *on the case for damages*, and the one of *Van Metre* v. *Mitchell*, tried before me some time since,* is that the latter, being debt for a penalty given by the statute, for the mere act of harbouring or concealing, the defendant would be liable on proof of such harbouring or concealment, irrespective of its effects; while, in the present suit, he can recover only to the amount or actual loss, which he shows he has suffered.

* Reported just above.

Have you then evidence to satisfy your minds, that the defendant harboured or concealed the fugitives mentioned in the declaration?

Did he do this, knowing them to be fugitives from labour, and to further promote their escape from the pursuit or reclamation of their masters?

Did he, by such harbouring and concealing, cause the escape of the fugitives, or hinder their recapture? If you find these facts to be true, your verdict should be for the plaintiff for the value of the slaves and interest, if you see fit to add it.

The jury, failing to agree on the first trial, were discharged, standing (as was said) *ten* for the plaintiffs, and *two* for the defendants. On the second they found a verdict of Guilty as to one of the defendants and damages of $2800 against him. The other defendants they found 'NOT GUILTY.'

[OLIVER v. WEAKLEY—COMMON LAW DOCKET, NO. 14, OCTOBER SESSIONS, 1849.]

SUTTON V. THE ALBATROSS.

[ADMIRALTY: RELEASE OF LIEN.]

Under the Pennsylvania Statute of June 13, 1836, giving to mechanics a lien for work done to vessels, the lien is not necessarily discharged by the party's taking a note, and giving a *receipt in full*. Such receipt may be explained by showing negatively, that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, a different purpose which induced the transaction.

Oc'r Sessions, 1852.

STATEMENT.

SUTTON had made repairs to The Albatross, a vessel, owned at Philadelphia by a corporation governed by directors elected from time to time. And under the statute law of Pennsylvania he had a lien on the vessel for his work. According to the usual and previous course of dealing of the company, as well with Sutton as with others, it had made its settlements every six months; but on this occasion the managers being about to resign prior to the expiration of that term, Sutton came to the president, rendering his bill up to the date of it, and requesting him to *close* the account previously to the change of directorship; as *if that was not done, a new board might raise some dispute or difficulty*, a thing which he wished to avoid. 'He requested the settlement,' it was testified, 'prior to the usual time, as a favour, *on account of the expected change in the directorship.*'

* Act of June 13, 1836.

The president, finding the account correct, directed *his clerk* to draw notes at four months for the amount, and to take Sutton's receipt for them; nothing having been said or suggested by any body as to the form of the notes or receipt, or as to the effect of either or both of them in releasing the lien. The clerk drew notes in the ordinary form at four months,

Oc'r Sessions, 1852.

Statement.

and gave them to Sutton, who, without saying anything, signed a receipt for them, drawn by the clerk, "IN FULL for repairs of steamship to this date."

Before the notes matured, the company failed, and made a general assignment: and Sutton, having produced and deposited in court all the notes, now sought to enforce his original lien against the ship. The question accordingly before the Court was, whether he had lost his lien by taking the notes in the manner stated. The District Court, from which the case was here on appeal, had decided that it was not lost.

The case was first called for argument somewhat out of course, but Mr. *St. G. T. Campbell* for the libellant, Sutton, regarding it as a clear case in favour of the lien, proceeded to argue it without much preparation, and without citing any authorities. Mr. *G. M. Wharton* and Mr. *Balch* having argued the case more fully, Mr. Justice GRIER at a subsequent day gave a written opinion, reversing the decree below, and so deciding that *the lien was gone.* In consequence however of the mode in which the case had been called, and on Mr. *Campbell's* promising to cite authorities on his side directly in point, the Court permitted a re-argument: and it was now heard again.

For the discharge.

Mr. *Wharton* and Mr. *Balch.* The law of Pennsylvania does not differ materially from the civil or maritime law on this subject. But as the lien claimed by the libellant, is given by the statute of Pennsylvania, the local law as to its extinguishment or waiver must govern. In one Pennsylvanian case,* it was decided that a new note, without a fresh con-

* Hart v. Boller, 15 Sergeant & Rawle, 162.

For the discharge.

sideration, is not a satisfaction of a preceding one, *unless it has been accepted as such.* And in another,* that the acceptance of a note without an express stipulation was not deemed a relinquishment of such a lien. In a third case,† the plaintiff had taken the note of the owner, and given his *receipt in full* of the bill for materials, and the Court below instructed the jury that such a receipt was not an extinguishment or satisfaction of the original bill as to affect his right to a lien. But the Supreme Court reversed the judgment of the Court below on this point, and decided this was a fact to be decided by a jury, and said, "By the receipt at the foot of the bill, it appeared that the plaintiff had accepted the owner's note 'in full of the bill,' which certainly was evidence to rebut the presumption, and ought to have been left to the jury."

* Kinsley v. Buchanan, 5 Watts, 118.

† Jones v. Shawhan, 4 Watts & Sergeant, 257.

In the case before the Court, Sutton's purpose was to 'close the account.' He took a marketable security, which was of itself an advantage, and gave *a receipt in full* on his bill. His intention must be judged of from his own written discharge or receipt. Without it, the law would not have presumed the note, if not negotiated, to be an extinguishment of the original debt. But, although a receipt in full may not have the technical effect of a release under seal, it is, till rebutted, conclusive evidence of satisfaction of the original debt. It is true that such a receipt is not an estoppel. It may be explained, or even contradicted. It may be shown to have been given by mistake, or obtained by fraud. But without other evidence showing that the parties did not intend, what their words clearly express, the Court have no right to presume it. The Court, in this case,

Oc'r Sessions, 1852.

For the discharge.

cannot devolve the duty of judging of the intention of the parties, upon a jury; and there is no evidence in the case which would justify a jury in deciding that the receipt does not express the meaning of the parties who signed it. The testimony shows that the plaintiff usually settled with the defendants every six months, and received their notes or payment in cash; and that in the present case they settled with the defendants, previously to the usual day, because they expected that a new set of directors might be elected, with whom they might have difficulty. Here, too, as in getting a negotiable security, they gained an advantage, which may well have been a consideration for releasing a lien. There is no evidence that Sutton had ever looked to his lien as a mode of enforcing payment, or ever intended to take the notes merely as additional or collateral security for his account, reserving their right to recur to it. He has indeed (as it appears in the result) acted without due caution; but that is no reason why the Court should construe his acknowledgment of satisfaction, as not meaning, what it plainly purports to mean, or presume a contract different from that which he himself has executed.

The Court's Opinion. Nov'r 3, 1852.

GRIER, J.—Taking the note of hand of the debtor is not *per se* legal satisfaction, unless there is evidence that the parties intended it should operate as such. Where the debtor has two securities, as in the present case, it will not be easily presumed, that he has voluntarily relinquished one of them, and that the best of the two. The giving the receipt for the notes, as in full of the account, it is true, is *primâ facie* evidence that such was the case. But a receipt

Oc'r Sessions, 1852.

THE COURT'S OPINION. Nov'r 8, 1852.

is no estoppel; and when we consider how little attention is usually paid to the peculiar form or expressions of such documents, signed by mechanics, and drawn up by the clerks of the employer, such formal words may be easily rebutted, by showing the true nature of the transaction. The note taken is no higher a security than the account, and, unless the transaction shows an intention to surrender without consideration the better security, these formal words in a receipt, given when the account is settled, ought not to be considered as at all conclusive of an intention to receive the lesser security as satisfaction. The case of *Jones* v. *Shawhan*,* is directly in point, and states the law as applicable to this case. The law as laid down in that case is this—a new note without a fresh consideration is not satisfaction of an open account, or of a preceding note *unless it has been accepted as such:* and though the presumption is, that a larger security is not exchanged for a smaller one, yet a receipt of the lesser security as "*in full*" is but evidence to go to the jury to rebut such presumption. But it is not conclusive, and when opposed by the presumption, it may be explained by showing that there was no contract to take the lesser security and release the better, and that the intention to accept it as satisfaction and relinquishment of another security, was not in the contemplation of the parties. In this case, the duty of finding these facts cannot be devolved upon a jury; and on a careful examination of the evidence, I am convinced that the libellant when he signed this receipt, had not the idea before his mind of releasing any security held by him. Nor did the officer with whom this settlement was made, contract for any such release,

* 4 Watts & Sergeant, 263.

Oc'r Sessions, 1852.

THE COURT'S OPINION. November 3, 1852.

or that the note should be received in actual satisfaction.

In the 1st place, it does not appear that notes were demanded for the purpose of having a marketable security on which to raise money, or that they were used for that purpose. They are brought into Court and surrendered. 2nd. The libellant called for a settlement of his account, not for the purpose of getting immediate payment by note, but to have the account settled and adjusted before the officers who had dealt with him, should send in their threatened resignation. The notes were given as evidence of the amount of the balance due on settlement, says the witness, "on account of the directors being about to resign." When the account was stated and adjusted with the President of the company, he ordered the clerk to draw these notes and take a receipt for them. No direction was given to the clerk in what form to draw the receipt either by the President or by Sutton. The clerk drew it in his usual form. Sutton signed it without criticising its form, or perhaps reading it. His object was to get his account settled, so that he might not have difficulty with the new officers of the corporation. No suggestion was made by either party, that these notes were either wanted to raise money on, or given as a favour, or received in satisfaction of any other security held by the mechanic. There was no consideration given, or intended to be given for the relinquishment of one of the mechanic's securities, nor did such an act enter into the contemplation of the parties at the time of their settlement. The clerk drew the receipt in the usual form in his receipt-book without any instruction from either party to put it in any particular form, and

Oc'r Sessions, 1852.

THE COURT'S OPINION. November 3, 1852.

thus made it have an apparent effect which was not within the scope of the contract, or contemplation of the parties.

Upon a more careful examination of the case than I was able to give originally, I feel satisfied that a jury would have been justified in finding that it was not the intention of the parties to this settlement to give or receive their notes in satisfaction of the debt so as to relinquish the security on the vessel given by law to the libellants.

DECREE AFFIRMED.

[COMMON LAW DOCKET, NO. 12, APRIL SESSIONS, 1852.]

MILLEDOLLAR V. BELL.

[PRACTICE: JUDICIARY ACT.]

[ASSIGNMENT OF CHOSE IN ACTION.]

In suing on a chose in action, if the plaintiff be not a citizen of the same State as the defendant, his right to sue is not taken away by the fact that the chose may have passed to him through the hands of persons who were citizens of that State, and so unable to prosecute a suit in this Court, provided the party to whom the chose was originally given was not such a citizen, and could himself have therefore prosecuted such a suit.

OCT'R SESSIONS, 1852.

STATEMENT.

THE judiciary act,* giving jurisdiction to the Circuit Court of suits between citizens of different States, says that this Court shall not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." In this case, which was a bill in equity to compel the sale of mortgaged premises, the bill set forth that the complainant, the mortgagee, one Milledollar, was a citizen of New York, and that the mortgagor, the defendant, Bell, was a citizen of New Jersey. But while setting forth seven intermediate assignments to persons who were named, it was silent as to the citizenship or residence of any one of them; except of the last, the present complainant, who was entitled, as already stated, a citizen of New York.

* Act of 1789, ch. 20, § 11.

On a demurrer to the bill, the question was, whether it was necessary to aver that each one of the assignees was or had been a citizen of a State different from that of Bell, the mortgagor and defendant.

For the Defendant.

In support of the Demurrer. In *Mollan* v. *Tor-*

rance,* a suit by an indorsee of a promissory note against an indorser, the declaration stated the plaintiff Mollan to be a citizen of one State, and the defendant Torrance to be a citizen of another; but was silent respecting the citizenship of one Lourie, a third person, the immediate indorser of the plaintiff, and a party through whom the plaintiff had to trace his title to the money for which the suit was brought. The Court, distinguishing the case from that of *Young* v. *Bryan*,† where the judgment was sustained, say, "the suit is brought against a remote indorser, and the plaintiffs in their declaration trace their title through an intermediate indorser, without showing that this intermediate indorser could have sustained his action." And quoting *Turner* v. *The Bank*,‡ decide that the count showed no jurisdiction. In *Brown* v. *Noyes*,§ in the 1st Circuit, the Court speaking of the clause of the judiciary act now under consideration, and making no distinction in the position of the indorsees, says its policy "was to prevent parties coming into this Court by assignments, when *those previously interested* were not entitled to come here." And in *Heckscher* v. *Binney*,‖ "when the suit could originally have been brought here, it might be now, if the *indorsee also* lived out of the State, and could sue here."

For the Defendant.

* 9 Wheaton, 537.

† 6 Wheaton, 146.

‡ 4 Dallas, 8.

§ 2 Woodbury & Minot, 75.

‖ 3 id. 333.

Against the Demurrer. *Wilson* v. *Fisher's Executors*,¶ in this Circuit, has decided this point, which nothing but the statement there made by Judge Baldwin, that the point had nowhere else, nor at any other time, been directly adjudicated, can allow to be treated *de novo*. The meaning and extent of the law, is there well presented at the bar. It is imma-

For the Complainant.

¶ 1 Baldwin, 133.

Oc'r Sessions, 1852.

For the Complainant.

terial, said Mr. *Rawle*, senior, *through* whose hands the debt may have passed by assignment. If the right to the debt is transferred to an alien he may sue, *not as representing his immediate assignor*, but the original party. *Turner* v. *The Bank*,* could not be sustained, because it did not appear that the *original* payee, under whom of course the plaintiff claimed, was a citizen of a State different from that in which the defendant resided. "The act of Congress," he said, "refers to the capacity of the party to whom the debt was originally due, to sue in the federal courts, his right passes to the last assignee, who, if he is an alien or a citizen of another State, has the same right to sue here, as if he was the plaintiff in the judgment." And he added, that "full effect is given to the proviso in the act of Congress, if the assignee is in the same situation as the party originally entitled to the debt; it would be straining the law beyond its obvious meaning, to put him in a worse." Here the complainant being a citizen of one State, and the defendant a citizen of another, the case comes within the enabling part of the law; and as a suit might have been prosecuted in this Court, if no assignment had been made, the complainant does not come even within the letter of the proviso.

* 4 Dallas, 8.

The Court's Opinion.

Grier, J. The bill avers that Milledollar, the mortgagee, is a citizen of New York. He could, therefore, have brought his suit in this Court for the contents of the bond and mortgage, "*if no assignment had been made.*" And to sustain the jurisdiction of the Court in his case, it would have been necessary only to aver that the mortgagors were citizens of New Jersey at the time suit was brought.

Oc'r Sessions, 1852.

THE COURT'S OPINION.

The complainant's case is therefore within the strict letter of the law—nor can we discover anything in the spirit, equity or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, *unless his immediate assignor* could have sustained such action; but only in case the Court could have had no jurisdiction as between the original parties to the instrument, *if no assignment had been made.* The situation or rights of temporary intermediate assignees, holders, or indorsers enter not into the conditions of the case.

The only case which has been brought to our knowledge, in which this point is directly decided, is that of *Wilson* v. *Fisher's Executors,** which fully supports our view of this point. *Mollan* v. *Torrance,*† in the Supreme Court of the United States, which has been quoted as upholding a contrary doctrine, will be found on examination to have no application. It affirms the doctrine of *Young* v. *Bryan,*‡ that an indorsee who resides in a different State, may sue his immediate indorser residing in the State where suit is brought, although the indorsee may be a citizen of the same State with the maker. The reason is, because the indorsee sues upon his own contract with the indorser, and not on the original contract of the drawer. But in the case last quoted, of *Mollan* v. *Torrance,* though Torrance was sued as indorser, Mollan was not the immediate indorsee, and it did not appear that Lowrie, who was the immediate indorsee and contractor with Torrance, could have sued in the Circuit Court. The question whether, if the

* Baldwin, 133.

† 9 Wheaton, 537.

‡ 6 Wheaton, 146.

Oc'r Sessions, '1852.

The Court's Opinion.

immediate indorsee could have sued, and the then present holder and plaintiff could also have sued by reason of citizenship, the rights of intermediate holders could affect the case, was not before the Court. The language used in the opinion of the Court, is perfectly correct, when applied to the case before it. No Court can pronounce dogmas of universal application; and the application of general expressions, in an opinion, to cases not before the Court, is a sure road to an erroneous result. The same remarks will apply to the cases decided in the first Circuit, and reported in different volumes of *Woodbury & Minot;** so far as the language of them can be made to apply to the present case at all. They are correct decisions of the case before the Court. But the point now under consideration was not raised nor considered.

* Brown v. Noyes, 2 Woodbury and Minot, 75; Heckscher v. Binney, 3d id. 333.

We are of opinion, therefore, that, as this bill shows that the complainant is a citizen of New York and the defendants citizens of New Jersey, at the time the bill was filed, and that the original contractor or mortgagee is a citizen of the same State, and could therefore have sued these defendants at the time this bill was filed, in the Circuit Court of New Jersey, "*if no assignment had been made*," this Court has jurisdiction of the case, and the citizenship of the intermediate holders, owners or assignees, is immaterial, and need not be averred.

DEMURRER OVERRULED WITH COSTS.

[AT TRENTON.]

CLARKE V. THE STEAMER FASHION.

[ABANDONMENT IN ADMIRALTY.]

Where a vessel is injured and sunk by collision in such a place, or under such circumstances, that for a small sum of money in comparison with the value of the vessel and cargo, she can be raised and repaired and the cargo recovered with slight damage, her owners have no right to abandon her and claim for a total loss.

The doctrine of abandonment as connected with cases of insurance, has not been imported into Courts of Admiralty.

O'c'r Sessions, 1852.

Statement.

THE steamer Fashion had run very negligently into a small river sloop, the Syrian, of 43 tons, owned by Clarke, and had injured her hull and stranded her in the mud near one of the Philadelphia docks. As she lay keeled over, the damaged side of her was partially above water even at high tide, and at very low water a part of her keel fore and aft was exposed. Not having been much injured, she was thus in a position capable of being raised and repaired without great difficulty or cost. She was a common coal sloop, with a cargo of coal worth at most $225, which was not essentially injured by the submersion; though rendered dirty and less saleable; a small part also, which had been on deck, being lost.

The owners of the steamer raised and repaired her; the cost of the raising being $150, and that of repairing her $50: and this, with the loss of $20 in bank notes which had been in the cabin; the injury or destruction of her sails, (not new) and whatever damage such a vessel and cargo would suffer from being 'from four to seven days' under water as it came and went with the tide, and whatever loss might occur by the detention—all which the owners

Oct'r Sessions, 1852.

of the steamer asked to have ascertained and were willing to pay—appeared to constitute the whole loss resulting from the accident.

The value of the sloop before the accident was about $1600.

Clarke, her owner, would not take her, thus repaired; but insisted upon abandoning her to the steamer as a total loss. She was accordingly now lying idle at the wharf; and whether she could be thus abandoned by Clarke insisting on her value, was the question before the Court. The District Court was of opinion and decreed that she might be.

For the abandonment.

*13 Jurist, 285.

Mr. *Donnegan* and Mr. *Kane* for the Sloop. *The Columbus** is in point. There, the Tryal, a fishing smack had been run down by the Columbus, and the last vessel having been condemned generally in damages and the matter referred to the Registrar to assess them, the whole value of the smack was allotted by that officer and his merchants; but nothing was allowed by them for wages and victualling, nor for net profits for the employment of the smack. After the collision, the smack had been raised at the expense of The Columbus, and part of her stores, apparel and furniture saved; and she was now lying in harbour repaired. No exception appeared to have been taken originally by the owners of The Columbus to the Registrar's report allowing full value; but the owners of the smack having excepted to the report because there was no allowance for wages, victualing and profits, the owners of The Columbus in turn excepted to being made to accept an abandonment at all, and to pay full value as for one. They insisted that under a decree of general condemnation

merely the Registrar had made a mistake in forcing the smack upon them and allowing as for a total loss, "and without regard to the hull of the smack or the stores," &c.: that the smack might have been repaired, and put into a fit and serviceable condition in all respects, 'within a month after the collision at a moderate expense;' and that they were not liable, under the decree of the Court for any other charges or expenses in respect of the damage than the charges and expenses which would have been incurred in repairing her and obtaining possession of her stores, &c.: and that all further loss and expenses were incurred by the owner's not taking possession of and repairing the smack, as he ought to have done."

Oc'n Sessions, 1852.

For the abandonment.

The reply made by the owners of the smack alleged that the owners "had a right to renounce and disclaim all title to the smack and stores."

The exact point now before us was therefore raised on the pleadings, and directly in issue.

The Court, Dr. Lushington, after casting out some speculations not very relative to his decree, says—On the whole I think the Registrar and merchants have come to a just and equitable conclusion." And the Reporter considered the point now before us as decided, for he says in his syllabus;* "The owners of the ship doing the damage, raised, at their own expense, the vessel sunk, and offered her to her owner, who claimed as for a total loss; he refused to take her:—*Held*, that the owner of the sunken vessel was not bound to take her, and might proceed and recover as for a total loss."

* P. 285.

Mr. *John Fallon*, for the Steamer. *The Columbus** Against the abandonment.

Oct'r Sessions, 1852.

Against the abandonment.

is really an authority in our favour, though cited with some apparent show against us.

In the 1st place: the vessel appears from Dr. Lushington's opinion, to have been 'sunk at sea,' or on the sea coast. The extent of the injury as compared with her value, is not stated, but it must have been large, for it was not alleged even by The Columbus, that the smack could have been put into a serviceable condition in less than "a month after the collision;" and Dr. Lushington's opinion would indicate that it was so bad a case, that she was in danger, after the accident of being "utterly destroyed." He refers to the "state she was in," after raising, as obviously bad: and states that it was alleged she could have been repaired "at much less than the sum allowed;" i. e. much less than her *whole value.*

2nd. The owner of The Columbus seems to have been content with the Registrar's decree, as it was made by that officer and the merchants. "*He* would not," says Dr. Lushington, "have disputed the report *unless it had been objected to in the first instance by the owner of the smack.*" He had disputed it, therefore, only to have it stand. He disputed it as a defence against the smack's attempt to disturb it: and to balance the alleged error of the Registrar in his favour, if there was one, by another not alleged, which was certainly against him. Dr. Lushington seizes this fact, and it is manifest that he did not mean to decide, as on a common law demurrer, the point which it may be admitted the pleadings technically raised, and was so far, "in issue." Ancient, common law, technical pleadings are not the forms of the Admiralty, nor are the doctrines derived from their character applied as of course to the forms of

Oc'r Sessions, 1852.

Against the abandonment.

*1 Wallace, Jr., 164.

this Court. Dr. Lushington decides his case upon a natural equity; and somewhat as this Court did in *Stimpson* v. *The Rail Roads*;* where they refused to disturb a verdict, because a blunder in one way was balanced by another blunder, in another.

"On the *whole*," he says, "I think the Registrar and merchants have come to a just and *equitable conclusion*." The *processes* by which they reached it were obviously not so satisfactory, and the difficulty was in regard to the point for which the case is cited on the other side as an authority. Speaking of 'the objection by the owners of the *Smack*,' he says, "I have no desire to disturb the report on *that* ground." But speaking of the objection by the owners of *The Columbus*, he speaks differently; and there it is that he indulges "in speculations" which, though "not very relative to his decree," are very relative to the grounds of it, and to this and other cases in which his opinion might be cited. "With regard to the other branch of the case," he says, "I mean the objections taken by the owners of The Columbus—I admit the case to be one of great difficulty, in which *it is impossible to lay down any general principles*; and I am reluctant to make remarks that might lead to litigation in future cases, but I entertain no doubt whatever, as to the true principle on which we ought to act. I have no intention of importing into this Court the principles that apply to insurance cases, with regard to abandonment. The rule on which I must proceed is this: if a vessel is sunk at sea, it is not incumbent on her owners to go to any expense whatever, for the purpose of rais ing her, thus incurring the risk of failure in bringing her to a place of safety. But I apply this only where

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a vessel is sunk, not where there is a chance of bringing her safe into port; for where a vessel is only partially damaged, and there is the slightest chance of bringing her into port, provided the expense does not exceed the value of the ship, the effort must be made."

And while he says that on the *whole*, the Registrar and merchants had come to an "*equitable*" conclusion, which he would not refer back; he says also, that he is not without doubt, what course either or both parties ought originally to have pursued. And he argues and speculates thus: The vessel having been 'sunk at sea,' her owner was under no obligation to raise her. The owner would, however, have run the risk of failing in a suit, if he chose to leave her, to sue here. But the owners of The Columbus *did* raise her, and then offered her to her owner, in "*the state she was then in.*" And his Honour thinks that if they had proceeded formally, each party would have applied for a sale, and that the proceeds might have been brought into Court. Going back, however, to a general, though irregular, equity, reached by the Registrar, he will not disturb it.

The Court's Opinion. October 30th, 1852.

Grier, J. The doctrine of abandonment, as connected with cases of insurance, has never been imported into Courts of Admiralty, and has no application to cases of collision. Where a vessel is injured by collision *at sea*, and *then* sunk, the owners are not bound to risk a greater loss than that of the vessel and cargo, on the mere possible chance or speculation of saving something, by endeavours to raise her, and are entitled to recover to the whole extent of their loss. But where she is only partially

O. & S. Sessions, 1852.

The Court's Opinion.

injured, and there is the slightest chance of bringing her into port, the effort must be made. The injured party cannot increase his claim for damages by a voluntary abandonment of his property, and make a profit on his own negligence. He cannot compel the owners of the colliding vessel to become the purchasers of his injured vessel, where she is only partially injured. His abandonment of his own property, confers no title on the offending party, who has no right to take possession or assume any ownership over a vessel, because he has injured it by collision. It is true, it would be his duty and policy to assist the injured vessel, if in his power, and to help save her, whether he should be ultimately liable for the injury or not.

The measure of damages in cases of collision, is the sum it would take to restore the injured vessel, and make her as good as she was before the collision. To this may be added, the loss of the daily hire of the boat during the time it would necessarily take to repair her, in the nature of demurrage. This amount is not to be decreased by introducing the rule of insurance cases, of a deduction of new for old, nor increased by consequential speculative damages, much less for those which are the consequence of the libellant's own negligence or voluntary dereliction of his property, and endeavours to convert a partial into a total loss. Collisions are daily occurring in our crowded ports, in which small sailing vessels are injured by steamboats. In such cases the steamboats are generally held liable for the damage. But I cannot countenance the doctrine, that if by such collision a hole is knocked in the side of a sloop or schooner, which causes her to sink in port,

Oc'r Sessions, 1852.

THE COURT'S OPINION.

within a few feet of the wharf, where assistance can be obtained and the vessel raised and restored for a sum not exceeding eight or ten per cent. of her value, that the owner of such vessel shall abandon her, and convert a small injury into a total loss, and thus sell his vessel to the owners of the steamboat, or leave her to perish, without the slightest endeavour to save her.

Yet such is the case before us. The sloop is partially sunk, *in port, close to the wharf*, where persons are ready and willing to raise her for $150, and repair her for $50 more; nevertheless, the libellant, instead of endeavouring to save his vessel, runs off to the admiralty and files his libel for a total loss, under pretence of abandonment. And when the respondents raise the vessel for him, and when she can be repaired for less than fifty dollars, he refuses to have anything to do with her, and leaves her tackle to the mercy of thieves, and her hull to rot from the effects of the weather. If a case could be produced which affirms the doctrine, that under such circumstances, the libellant should recover the whole value of his vessel, I should not hesitate to dissent from it. The case of *The Columbus*,* relied on at the bar, supports no such doctrine. There the vessel was sunk *at sea*— the mariners could not bring her *into port*, and were forced to abandon her. And although the defendants did afterwards raise her, the Court decided that, although the libellants were bound to use every endeavour to bring her into port, yet they were not bound to risk money, in uncertain attempts to raise a wreck at sea. The case is no precedent for the conduct of the libellant in this case; nor can he be permitted to speculate on the accident or misfortune,

*13 Jurist, 285.

Oc'r Sessions, 1852.

THE COURT'S OPINION.

and compel the respondents to pay damages incurred by the libellant's negligence and folly. It is enough if the owners of the steamboat have to pay the damages consequential on the negligence of their servant, without being liable for those voluntarily and unnecessarily caused by the libellant.

This case is therefore referred to the clerk of this Court, to assess the damages according to the principles we have stated, with directions to examine and report any further testimony which may be produced on the subject.

[APRIL SESSIONS, 1852, NO. 3, COMMON LAW DOCKET.]

GONZALES, MARINERS, V. MINOR, MASTER, & FIGUERA ET AL.

[INTERNATIONAL COMITY: ADMIRALTY INTERVENTION.]

[COSTS.]

The exercise of Admiralty jurisdiction in suits by foreign seamen for wages, is matter of comity rather than of duty; and generally speaking, is exercised only under such circumstances as might infer the presumption of a request from the foreign State: as, for example, where a voyage is ended or broken up, and the seamen discharged; or where there is strong reason to believe that there would be a failure of remedy, in case the mariners were compelled to await an opportunity of obtaining redress in their own courts.

In a case of 'transparent contrivance,' proved by an intervenor upon evidence in this Court, which was not before the Court below, the libel was dismissed with costs to the intervenors and consignees, against the libellants and the contriving defendant, contrary to the rule established in *Carrigan* v. *The Charles Pitman*, (1 *Wallace, Jr.* 307,) which does not allow costs on a judgment of reversal in this Court, obtained upon new evidence, not had in the Court below.

Oc'r Sessions, 1852.

Statement.

THIS was a libel for wages by ten Spanish sailors, mariners of a Spanish schooner, The Vencejo, against Antonio Minor, its master, and Figuera and others, consignees in whole or in part of the cargo or vessel. The libel set forth that the schooner having been at Barcelona, and 'destined on a voyage thence by way of Cette to Philadelphia,' the said master hired the libellants to serve as mariners "for and during said voyage;" but it stated afterwards, that the vessel having arrived at Philadelphia and delivered her cargo, and made freight, "that the libellants *still continue on board and in the service of the said schooner.*" There was no allegation, therefore, that the voyage was ended. The libel sought process against the respondents, but asked none against the vessel. It claimed wages to the amount of $660; it being sworn that one mariner had shipped at $40 a

month, another at $25, and another at $18. No copy of the shipping articles was annexed. The return of the process was *Non est inventus* as to Minor, the master; and an attachment of the credits and effects of the owners of the vessel in the hands of the consignee, to the value of $660.

A few days previously to this libel being filed, on the 11th of September, 1851, Messrs. H. & W. P. Hall, of South Carolina, had brought a suit against one Manuel Roger, a foreign attachment, in a State Court at Philadelphia, attaching his estate in the hands of this Minor & Figuera & Co.; and under this process the ship—alleged to be his, in part—was taken possession of by the sheriff, and the freight in the hands of Figuera & Co. claimed, as belonging to *him*.

The answer of the master, Minor, *admitted* "that *all* the allegations in the said libel were true:" that Figuera and others were consignees, and had received between $640 and $650, which they declined to pay over, "upon the allegation of some foreign attachment having issued, under which the said schooner had been seized;" and asserted that the respondent had "no funds to pay said demands of libellants, as well as other expenses incident to said attachment;" and that his own wages were also unpaid. And it concluded with the admission and request, "that all and singular the premises are true and within the admiralty and marine jurisdiction of this honourable Court, in verification whereof, if denied, the *respondent* craved leave to refer to the depositions and proofs to be by *him* exhibited in this cause."

Figuera and others, the consignees, stated in their answer, that they had no knowledge of their own

Oc'r Sessions, 1852.

Statement.

respecting the amounts stated in the libel to be due the libellants; that a foreign attachment, of which they annexed a copy, (the attachment by Messrs. H. & W. P. Hall,) had been served on them, in which Roger, the defendant in it was alleged to be owner, or part owner, of the vessel; and that as consignees of part of the cargo and vessel, they had received of the freight of her last voyage, of which there remained in their hands, $648.18, which they were ready to pay to whomsoever might be entitled to it.

The mariners were represented by Mr. *John Fallon;* the master, Figuera and Others, by Mr. *Christopher Fallon.* The libel of the mariners was filed on the 19th of September, 1851. The answer of Minor was prepared and sworn to on the 17th, *two days before any application for any process was made.*

In this state of the pleadings, the Messrs. Hall, already named as the persons by whom the foreign attachment, referred to in the answer of Figuera & Co., had been laid, intervened, setting forth that the allegations of the libel were not the whole truth; praying that the libellants might be obliged to produce the shipping articles, by which, they were informed, it was contracted that no wages should be paid till the termination of the voyage, which *did not terminate at Philadelphia;* praying that Minor might be held to proof of his allegations, about having no money; stating that they were informed that the filing of the libel was a contrivance between the libellants, Minor & Figuera & Co., to defeat the attachment of the intervenors, the Messrs. Hall: that Minor was part owner of the schooner, and had received from Figuera & Co. large sums of money, and

that he had moneys to defray wages, if due. And praying security from the libellants and respondents for costs; the said libellants *having sailed with the said Minor in the* Vencejo. This last fact was one which was not denied in any part of the pleadings.

The District Court dismissed the answer of the intervenors, and decreed in favour of the wages. The case being now here on appeal from this decree, Mr. *Waln*, in behalf of the intervenors, the Messrs. Hall, produced, under objection of Mr. *John Fallon*, (not sustained by the Court,) as to their competency and relevancy, three several letters, dated the 13th and 16th of September, 1851, to the sheriff of Philadelphia county, who had served the process of foreign attachment in the suit of *Hall* v. *Roger*, from Messrs. *C.* and *J. Fallon*, the respective counsel in this suit of the complainant, the sailors, and the defendant, Minor; but on that suit jointly representing Minor, the defendant; and complaining to the sheriff in his behalf, of the detention of the vessel by that officer, under the foreign attachment in the suit of *Hall* v. *Roger*. In one of them, of September 13th, that is to say, six days before this libel was filed, Messrs. "*C.* and *J. Fallon*, for Capt. Minor," (the facts stated in the letter being sworn to, as true, by Minor,) write to the sheriff, as follows:

"*Hall* v. *Roger*, Supreme Court, December Term, 1851.—We are informed by Captain Antonio Minor, that under the writ in the above case, you have attached the schooner Vencejo, and on sending to your office, we were informed by your deputy, that the whole vessel is attached. Capt. Minor *is part owner of the schooner*, and at the time of the attachment was in possession of her, sailing her as captain, under

Oc'r Sessions, 1852.

Statement.

agreement with the other owners. The right of defendant, if any, is subject therefore to the right of Capt. Minor's possession, and you cannot rightfully dispossess him of it. We are directed, therefore, by Capt. Minor, to notify you that the schooner cannot be rightfully taken out of his possession by you under the above attachment, and you are required forthwith to remove your officer from on board, and permit the vessel to sail, otherwise you will be held liable to damages, costs and expenses of every kind. You will further take notice, that the schooner is now ready to sail with a cargo on board, and that having taken charge and possession of the vessel, you will be held accountable for the cargo on board, and for the loss of freight, as well as for other damages, if the same shall be removed, and you are warned on no account to permit the same to be removed by any person on any pretext whatever."

In another letter of the same day, Messrs. *C.* and *J. Fallon* write "for Minor:"—"We understand your note to be, that the sheriff don't mean to interfere with the captain's sailing with the vessel referred to. And we have accordingly instructed him to leave with the vessel, holding you responsible for the damages already sustained. If we have misunderstood you, please say so at once, and instruct the officer you have placed on board."

The Court's Opinion. October 30th.

GRIER, J. The District Court decreed in favour of the libellants, on the state of pleadings and proofs, as the case stood before them. But I am of opinion that the bill should have been dismissed, on grounds not taken in the argument of the case in the District Court, and for reasons which, if they had been urged

Oc'r Sessions, 1852.

THE COURT'S OPINION.

in the argument before that Court, would have produced a different result.

We do not think it worth while to inquire whether the intervenors have taken the proper steps to compel the production of the shipping articles, in order to show whether the mariners contracted for a voyage to Philadelphia and back again to Spain, because we think that no sufficient allegations appear on the face of the pleadings or in the evidence, to justify the interference of the Court in favour of the libellants; and moreover, because we are satisfied from facts either admitted or apparent on the record, that the proceedings as between the libellants and master, are collusive, and instituted for the purpose of evading the attachment laid by an American creditor, in a suit against one of the owners of the vessel.

A Court of Admiralty has jurisdiction in suits for wages, promoted by foreign seamen against foreign vessels, as questions of general maritime law. But the exercise of such jurisdiction is discretionary with the Court, and to be permitted or withheld according to circumstances. The *express* consent of the foreign minister or consul, is not essentially necessary to found such jurisdiction. Nevertheless, the exercise of it, is rather a matter of comity than of duty. Whether it ought ever to be exercised against the remonstrance of the representatives of such foreign nation, we need not inquire; as we cannot foresee all possible cases, and that question is not before us. But when the Court *does* entertain such cases without the request of the representative of the government, they will require the libellants to exhibit such a case of peculiar hardship, injustice or injury, likely to be suffered without such interference, as would

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THE COURT'S OPINION.

raise the presumption of a request, because it is in fact conferring a favour on such foreign State. If the contract with the mariners has been dissolved; if the voyage has been terminated, and there is a dissolution of the relation of the seamen with the ship; or if such dissolution has been caused by some wrongful act of the master; or if a bottomry bond has become due at the end of the voyage, and the remedy might be endangered by delay, in such and like cases as a matter of comity, not of right, Courts of Admiralty will interfere to protect the rights of foreigners in our ports.

I do not think it necessary to examine specially each of the numerous cases to be found on this subject. They are sufficiently collected in the books.* *It will appear from them that Courts of Admiralty have expressed extreme unwillingness to interfere in suits for wages, by a foreign mariner against a foreign ship; and have done so only where there was strong reason to believe that there would be a failure of remedy, in case the mariners were compelled to await an opportunity of obtaining redress in their own tribunals.* In such cases it may well be presumed that the nation over whose vessels we assume this jurisdiction, will consider it as an act of comity, and not of unwarranted interference.

* Pritchard's Dig. p. 477, Tit. Wages; Abbott on Shipping, Bost. p. 786.

If, in this case, the voyage had been ended and the mariners discharged by the master, it would undoubtedly have presented a proper case for the interference of our Court, to assist them in recovering their wages. But it is averred in the pleadings, and not denied as a fact, that the mariners returned on the home voyage to Spain in the same vessel, in company with the master, who was personally liable,

Oc'r Sessions, 1852.

The Court's Opinion.

and himself an owner. The mariners have in the vessel an ample security for their wages. Although the libel states, that they shipped on a voyage from Barcelona to Philadelphia, it does not state the voyage ended here, or that they could not, on their return, have ample remedy or redress in their own courts. On the contrary, it is abundantly evident from the face of these records, that this libel has been by agreement and collusion with the master, for the purpose of wresting the money in the hands of the garnishees from the foreign attachment.

In order to trump up a bill equal to the balance of freight, charges of $18, $25, and even $40 a month, are set down as mariners' wages. The answer of the captain (admitting every thing alleged in the libel,) is drawn out and sworn to *before the libel was filed* or *process was issued*. The vessel is rescued from the attachment by the claim of the captain, as part owner in possession, and carried away. The captain, mariners and vessel, have returned together to Spain, after having schemed and executed this transparent contrivance to rescue the freight from the attachment. It would be an excess of comity for an American Court to interfere in a case of this kind, in order to enable the master of a foreign vessel to elude the process of our Courts in favour of one of our own citizens.

The libel is dismissed with costs, adjudged to be paid to the intervenors and consignees by the libellants and Antonio Minor, the master, jointly and severally.

DECREE REVERSED.

[OCTOBER SESSIONS, 1851, NO. 2, COMMON LAW DOCKET.]

GOODYEAR V. THE RAIL-ROAD.

[PATENT: DESCRIPTION: SPECIFICATION.]

Patents are benignly construed in favour of inventors; and in considering the validity of a patent, objected to for want of a proper "description of the invention or discovery" having been filed previously to its issue, this description, even if quite wide of truth when taken literally, may be aided and made good by the description of "the manner and process of making, constructing, using and compounding the same." Thus, where the "description of the invention or discovery" described a *process*, and did not describe a *product*, but the description of "the manner and process" showed that the purpose and merit of the process was the production of a valuable '*fabric*,' it was held, in a suit for infringing the patent, by improperly using the product, to be no objection that the "description of the discovery or invention" described not it, but a *process*; the "description of the manner and process" showing that the purpose and merit of the process was the production of a '*fabric*.'

When a full and candid description of the manner and process of making and compounding any invention or discovery, describes such manner in a concrete and illustrative, rather than in an abstracted and essential way, the description will cover every kind of application which was meant to come within, and which men of science can see is really involved in the principle attempted to be described. And so conversely, where an abstract description or abstract term is used, or an agent is described generally, rather than in its forms, the application of the thing, and not the form of the thing being patented,—this is enough. The last point is the one adjudged, the other being asserted.

MARCH SESS'N, 1853.

STATEMENT.

THE Act of Congress, commonly called the Patent Acts,* makes it a pre-requisite to the issue or validity of any patent, that the inventor "shall deliver a written *description* of his invention or discovery, and of the manner and process of making, constructing, using and compounding the same, in such full, clear and exact terms, &c., as to enable any person skilled in the art or science to which it appertains, &c., to make, construct, compound and use the same."

* July 4, 1836, ch. 357.

With this law in force, Mr. Charles Goodyear, the inventor or discoverer of Vulcanized India Rubber, obtained a patent for that valuable substance. His invention or discovery was described by him "as a

new and useful improvement in the *processes* for the manufacture of India Rubber." His *description* of "the manner and process of making, constructing, using and compounding the same," or, as it is sometimes called, his specification, first stated the valuable qualities possessed by Caoutchouc or India rubber; it being elastic, water proof, and durable. But went on to say, that it was in a measure useless, because it became soft, clammy, and would even dissolve under the action of a moderate degree of heat, and also became hard with cold; that the great desideratum was to get a substance, or preparation of rubber, which would retain its good qualities and remain unaffected by heat or cold; that thus far the only step towards improving this substance, was a discovery that a compound of sulphur with caoutchouc, improved its qualities for some purposes; that the patentee commenced a series of experiments with a view to render India rubber capable of resisting heat and cold, by treating it with heat. That finding that this substance, if subjected to heat by itself, could not be cured, he was led to experiment on it, in combination with other substances; that afterwards he discovered that when compounded with sulphur, and treated with a *high degree of heat*, good results were obtained; and finally, that a compound of *caoutchouc, sulphur and carbonate of lead*, when treated with *a high degree of heat*, produced the desired result; but that this result could be obtained only by a high degree of heat. He then went on to describe the nature of his invention as follows: "The nature of the first part of my invention consists in *curing* caoutchouc, or India rubber, when combined with, or in the presence of sulphur, by submitting

MARCH SESS'S, 1853.

STATEMENT.

the same to the action of a *high degree of artificial heat*, at a temperature above solar heat, say from 212° to 350°, or thereabouts; whereby this substance becomes so changed in its properties, as to resist, without material change, the variations of temperature below that under which it is *cured*, and also the action of the expressed and essential oils, and its other known solvents. And the second part of my invention consists in *preparing and curing* the triple compound of caoutchouc or India rubber, sulphur, *and a carbonate or other salt or oxide of lead*, for the purpose above pointed out." He then proceeded to describe the process and relative proportions of the materials which enter into the composition of "his fabric;" and after stating the leading features of his invention to be the effects produced by *heat* on the rubber thus combined, he concludes as follows: "What I claim as my invention, and desire to secure by letters-patent, is, the curing of caoutchouc or India rubber, *by subjecting it to the action of a high degree of artificial heat, substantially* as herein described, and for the purposes specified. And I also claim the preparing and curing the compound of India rubber, sulphur, *and a carbonate or other salt or oxide of lead*, by subjecting the same to the action of artificial heat, *substantially* as herein described."

In the present suit by him, a bill for injunction against the defendants, for using the vulcanized India rubber in car-springs, it was not denied by the defendants that they had used such India rubber, and used it without any license from Goodyear. But their defence was (among other defences):

1. That the rubber was made by a process in which *steam*, and not heat, is the chief agent.

MARCH SESS'S, 1853.

2. That the complainant's patent is for *a process of curing rubber*, and not for any *product or manufacture;* and that they had never used the process, whatever the case might be in regard to the product.

THE COURT'S OPINION.

GRIER, J. What forms the essence or substance of this discovery? What is the *sine quâ non*, or that without which this composition of matter cannot be produced? The specification says, it is the application of a high degree of heat between 212° and 350° of Fahrenheit. You may vary the proportions of sulphur, or change the metallic oxydes, and succeed more or less, if the exposure to heat between these points be continued for a sufficient time. But no mere changes in the combined materials will have a beneficial effect without this application of a high degree of artificial heat. Now, it must be evident that any person having the benefit of plaintiff's discoveries, starting from the platform erected by him, may possibly vary the process and obtain the same result. He may use salts of zinc for salts of lead, arsenic or magnesia for sulphur, or heat by steam instead of air; and many other variances of the relative proportions of the materials might be discovered to be as good as those patented. Yet it must be equally evident that such person is pirating the plaintiff's invention. Suppose that before Goodyear's discovery a manufacturer had taken to a chemist's laboratory some India rubber, sulphur, and white lead, and asked him to make him a compound, having the qualities now exhibited by the substance known as "vulcanized rubber." He would have received an answer denying the possibility of making such a compound by any process known to scientific men.

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Now, suppose he had put into the same person's hands the specification of plaintiff's patent, and asked him to discover some means by which the same result might be produced in mode, or proportions, different from that set forth in the patent. What science was before incapable of performing by synthesis or any reasoning *a priori*, can now be improved by valuable hints derived from analysis. The chemist can now immediately suggest many changes in the process, which may produce equivalent or better results. He could at once suggest that a carbonate of zinc, or some other metallic oxide, could probably perform the office of white lead; that possibly arsenic, or magnesia, or some other metal or earth might be substituted for sulphur; that sulphur might be used better, perhaps, in a gaseous form; that the high degree of heat, so necessary to the process, could be as well or better applied by means of steam than dry heated air. Yet, no one whose perceptions are not perverted, can fail to see that all such changes of mode or operation, such interposition of chemical equivalents, though possibly improvements on the original process patented, have their foundation on the patentee's first discovery, and start by appropriating or pirating it. It must be obvious, also, that there is not only a distinction, but a wide difference between one who merely invents a new method or process, by which a well known fabric, product, or manufacture is produced in a cheaper or better way, and the discovery of a new compound, substance, or manufacture, having qualities never found to exist together in any other material. In the first case, the inventor can patent nothing but his process, and not his composition of

matter. In the latter, both are new and original, and both patentable, not severally, but as one discovery or invention. It is evident, also, that the question of infringement must, in such cases, depend on different conditions. Steel is a well known substance. Any one who could devise a new and cheaper method of combining the iron and carbon in order to form it, could patent his process only; and every other person would be at liberty to devise any different process for effecting the same purpose. But if steel, as a substance, was before unknown, the person who first discovered that a composition of iron and carbon could be made to assume such valuable qualities, would have a right to patent not only his process, but his product. And no person who had thus taken the benefit of the patentee's discovery, and by it was informed of the valuable qualities of this compound of iron and carbon, could, by varying or improving the mode or process of its production, rob the patentee of his franchise.

Even assuming this patent to be merely for a process, and not for a product or fabric, still in a question of infringement, the inquiry is, what is the essential or substantial agent in the patentee's process or discovery? The specification affirms it to be *a high degree of artificial heat*, and that no commixture or combination of substances with caoutchouc will give it these qualities, unless the composition be exposed for a length of time to such high degree of heat. It is clear that the plaintiff claims the vulcanization of rubber and sulphur by artificial heat, however produced. The modes of producing heat are very numerous and extremely different. But the result is the same. Heat is heat, however produced,

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or by whatsoever agent. The method of communicating heat is not the thing patented; and even if it were the thing, and steam were a patented invention or discovery, made since the patent of Goodyear, while certainly Goodyear could not use it, still the defendant could not, by applying this new form of heat to the curing of rubber, go on and destroy all Goodyear's existing patent-rights. But steam is not patented by Goodyear, nor by any body to cure rubber. On the contrary, it is curing rubber by artificial heat that is patented. Steam is indeed an effect of heat on water, but it is also heat itself. We have, therefore, no doubt that the use of steam in place of heated air, in the manufacture of Vulcanized India Rubber, is an infringement of the patent of Goodyear.

II. If the premises assumed in the second objection are true, the conclusion is correct. A patent grants to the patentee "the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery." The sale or use of the product of a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself; and the patent for a discovery of a new and improved process, by which any product or manufacture before known in commerce may be made in a better and cheaper manner, grants nothing but the exclusive right to use the process. Where a known manufacture or product is in the market, purchasers are not bound to inquire whether it was made on a patented machine, or by a patented process. But, if the patentee be the inventor or discoverer of a "new manufacture or composition of matter not known or used by others before his dis-

covery or invention," it is clear that his franchise, or sole right to use and vend to others to be used, is the new composition or substance itself. The product and the process constitute one discovery, the exclusive right to vend which, for a limited term, is secured to the inventor or discoverer, as a consideration or compensation for making it known to the public.

That the composition of matter now known as "vulcanized rubber" was not known before the discovery patented by Goodyear, and that it has since been most beneficially and extensively applied in numerous manufactures, as a substance having certain qualities not possessed by caoutchouc in its natural state, or any other known substance, are facts sufficiently known.

Patents are granted "to promote science and useful arts." They are not odious monopolies, or restrictions on the rights of the public. For the temporary privilege given to the inventor, the public receive the full compensation by the publication of the invention. And when the specification of a patent honestly sets forth the process and mode of compounding a new and valuable composition of matter, Courts are bound to give it a liberal construction, and not to fritter it away or annul its benefits by formal or subtle objections.

On account of the vagueness and indefiniteness of the language used in describing the various arts, machines, manufactures, and compositions of matter, it is impossible to describe the real nature of many discoveries or processes, in language absolutely free from all ambiguity and all misconstruction. Different persons looking at it from different points of

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view, would describe it in different terms. In the present case, one might describe it as "the art of curing India rubber;" another, as "a new and useful improvement in the process for curing India rubber;" another, "the art of rendering caoutchouc and manufactures in which it is used, insensible to heat or cold, or the action of most of its known solvents;" another, as "a fabric, manufacture, or new composition of matter, having qualities never before combined in any other known substance, being elastic, waterproof, insensible to acids, to heat, or to cold."

Still, call it what you will, if the patentee has set forth fully the materials, their various proportions, and the processes necessary to the production of this composition of matter, he has done all that the law requires, and should be entitled to its protection. The patent should be carefully examined to find the thing discovered, and if it be clearly set forth, the patentee should not suffer for the imperfection or vagueness of the language used in describing its true extent and nature. The description ought not to be repugnant to the specification; but, provided it honestly sets forth in few words the *nature and design* of the patent, it is sufficient. The specification must be looked to for the full disclosure of the discovery and the extent of the inventor's claims. It should show what the patentee claims to have discovered or invented; wherein it differs from what is heretofore known; and by what combinations or processes the new material may be compounded. While the specification is usually, and always ought to be drawn, with the assistance of learned and able counsel, the short description in the patent is usually suggested by the Commissioner of Patents. The extent of the

patentee's rights must be judged from the whole instrument taken together, and not from any one sentence.

It is essentially proper, in patents for complicated machines, that the specification should clearly set forth what the patentee admits to be old, and what he claims to be of his invention, and that he should be held to such statement. In anomalous cases like the present, when a new product has been discovered, and the process of compounding it or obtaining it is disclosed, the patentee, by stating his discovery and revealing his process, has done all that he is required to do or can do. The careful separation of new from old, the limitation of claims to particular parts or combinations, cannot be required as a substantial part of the specification. If a specification sets forth a discovery, a new composition of matter, and the process for compounding it, that should be taken as the extent of his claim and the measure of his franchise.

Now, what is this India rubber, cured substantially, as described in Mr. Goodyear's description? It is clearly not merely an improved method or process of producing an old and well known composition or material, but it is a new product, fabric, manufacture, or composition of matter, having qualities possessed by no other known material. This is what is described and claimed in the patent, a new product as well as a new process.

The product and process being both new and proper subjects of a patent, the patentee has a right to prohibit the sale or use of the composition, unless when purchased from persons licensed by him to use the process and vend the product.

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THE COURT'S OPINION.

*Tried in June, 1851.

If precedent be needed for this doctrine, the case of *Hancock* v. *Somerville,* in the English Court of Common Pleas,* will be found directly in point. In that case Hancock had seen samples of vulcanized rubber made by Goodyear, and had succeeded in discovering the process for preparing it. His patent was for "improvements in the preparation or manufacture of caoutchouc, in combination with other substances, which preparation or manufacture is suitable for leather, cloth, and other fabrics, waterproof, and to various other purposes for which caoutchouc is employed." The claim in the specification was in these words: "What I claim as my invention or discovery, is—First, the combination of caoutchouc with silicate of magnesia, whereby manufactured caoutchouc is rendered free from that clammy and adhesive character which it usually possesses. Secondly, I claim the modes herein described of combining asphalte with caoutchouc: and, thirdly, I claim the *treating of* caoutchouc (either alone or in combination with silicate of magnesia, or other substances) with sulphur when acted on by heat, and thus changing the character of caoutchouc herein described." The infringement charged upon the defendants was the importation and sale of articles made by Goodyear. Hancock was decided to be an independent original inventor, though posterior to Goodyear, because the substance, manufactured by Goodyear, did not disclose the process by which it was compounded or manufactured. And the sale of articles in England, manufactured by Goodyear, was adjudged to be an infringement of Hancock's rights as secured by his patent. The patent of Hancock describes his invention as "An improvement in the

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preparation, &c." His specification and claim sets forth a new product and a new process, in terms, not as well chosen as those of Goodyear's patent; yet not even a doubt was suggested by counsel that the sale or use of articles manufactured by Goodyear was an infringement of Hancock's patent, pfovided his patent could be supported. We should ill protect one patentee (who is admitted to be the first inventor) if we should permit articles manufactured by Hancock to be placed in competition with Goodyear here; while the English Courts, in the construction of a similar patent, restrain the sale of Goodyear's articles in England. Yet such would be the necessary consequence of a decision of this point adverse to the complainant.

INJUNCTION DECREED.

[AT TRENTON.]

ASPDEN'S ESTATE.

[IMPLIED REPEAL OF STATUTE: HEIR AT LAW: STATUTORY HEIR AND COMMON LAW HEIR: PAROL EVIDENCE TO EXPLAIN WILL: COMMON LAW CANONS OF DESCENT: HEIRS EX PARTE PATERNA: AND HEIRS EX PARTE MATERNA.]

The implied repeal of statutes not being readily to be inferred, a section of an old law containing a short but important expression, was held not to be repealed by a section in a new act which legislated generally on the same subject, omitting only the short expression; the later act being declared to be 'supplemental' to the old one: referring to it as 'incomplete,' and repealing, *in terms*, another section.

The term 'heir-at-law,' especially when found in context with the term 'lawful heir' as a synonyme, means, in Pennsylvania, the person on whom the law of the commonwealth casts the real estate of an intestate, at the time of his death; and it does not mean the person on whom the common law of England, as distinguished from the law of Pennsylvania, casts such estate.

A devise to one's 'heir-at-law,' or 'lawful heir,' passes the estate to such persons as, at the time of the testator's death, answers by the then existing law that description; and contemplates not only changes from death in the persons designated by the term, but changes also by legislation in the *laws* regulating successions and descent. Thus where a testator domiciled technically in Pennsylvania, though resident most of his life in England, devised estates to his 'heir-at-law,' or 'lawful heir,' those terms, as the law stood when he made his will, indicating the heir at the common law of England, but, at the time of the testator's death, indicating wholly different persons—st. whole classes, who were absolutely incapable of inheriting, as the law stood when the will was made—it was held that these last persons, and not the former person, were the 'heir-at-law,' or 'lawful heir,' and the parties, therefore, to take.

The terms 'heir-at-law,' or 'lawful heir,' mean so clearly and fixedly, in Pennsylvania, heir by the law of *that State*, whatever it may be, statutory or other, that its meaning is not easily controlled or shaped into the common law signification, when differing from it. Thus where a testator, domiciled technically in Pennsylvania, though resident most of his life in England, devised his estates to his 'heir-at-law,' or 'lawful heir,' he *first* paying certain legacies to A. B. & C.; it was held, that A. B. & C., being the Pennsylvania statutory heirs, should take the estates, notwithstanding the provision by which they would have *first* to pay *themselves* the legacies; and that the estates should not go to D., a different person, the heir at common law, who could more properly *first* pay the legacies to A. B. & C. while subject to, or after such payment, he took the estates himself.

Though the expression 'heir-at-law,' has been often used in professional and judicial parlance in Pennsylvania, as meaning heir at the common law of England, yet it is not rightly and with legal exactness so used. And especially when explained by the term 'lawful heir,' used as a synonyme with it, it presents no such ambiguity as to let in parol evidence, of any kind, as to the sense in which a testator technically domiciled in Pennsylvania, though resident most of his life in England, used it; or more particularly to show that such a testator used it in the sense of the English common law, *i. e.* to mean the person who should, at the time of his death, be nearest in blood and descent from a common ancestor of the full blood, by his father's side, and did not use it in its general legal sense, *i. e.* to mean the person or persons on whom the law of his domicil would cast his real estate, on his death intestate.

A general testamentary disposition of all one's 'estate *real* and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who had no real estate, either when his will was made, or afterwards, is not a disposition of it to *the next of kin*; the term 'heir' being capable of an abstract sense as well as of a concrete one; and it not being true in legal any more than in popular sense, that there can be no *heir*, unless there is property strictly *heritable*.

A general testamentary disposition of all one's 'estate *real* and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who, neither in law nor in fact, had any real estate, either when his will was made or afterwards, but who, some years prior to the time his will was made, received by devise from his father such estate, which he himself occupied for some time, and never *aliened*, but which had been confiscated by the commonwealth for his alleged treason, and had been, in law and in fact, irrecoverably taken from him by legislative acts, whose legality, *validity*, and moral justice he ever strenuously denied, and which estate he always pertinaciously, though absurdly, claimed during a term of more than forty years, and until the day of his death, to own and dispose of as his own, entertaining a hope or pretence of hope, though an absurd hope, that his heir if not himself, would some day gain it; it being a thing, as the testator warmly, though absurdly said, in which his heir had rights, and which "*he could not lose*:"—does not carry the personal estate into the channel of heirship *ex parte paternâ*, as distinguished from heirs *general*.

Nor can evidence extrinsic to his will, of the testator's mistaken and absurd belief, be received to narrow the construction of terms of law so clear, unrestricted, and general as 'heir-at-law, or 'lawful heir,' which terms, including heirs *ex parte maternâ*, as much as heirs *ex parte paternâ*, passes the personal estate to the heirs of both sides jointly.

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Statement.

By the eleventh section of a Pennsylvania statute of 1794, directing the descents of intestates' real estate in that commonwealth, it is enacted, as set forth in the *left* hand column below; and by the seventh section of an act of 1797, entitled an act *supplementary* to the former one,—the preamble to one section of which says, "And whereas the provisions of

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Statement.

the act to which this act is a supplement, appear to be *incomplete*,"—it is enacted as set forth in the *right* hand column below. The two acts form a scheme of descents. The latter act nowhere *in terms* repeals any part of the former act, except a second section of it, which it does repeal in *express terms*.

Act of 1794. Section XI.

Where any person shall die seised as aforesaid, leaving no children, or lawful issue, father or mother, brothers or sisters, or their lawful issue, of the whole blood, then brothers and sisters of the half blood, *and their lawful issue*, shall inherit the same as aforesaid, *in preference to the more remote kindred* of the whole blood, *unless* where such inheritance came to the said person so seised by descent, devise, or gift, of some one of his or her ancestors, *in which case, all those who are not of the blood of such ancestor shall be excluded from such inheritance.*

Act of 1797. Section VII.

If the intestate shall die seised or possessed of real or personal estate as aforesaid, leaving neither widow nor lawful issue, father or mother, but brothers and sisters, of the whole and half blood, or their representatives, the brothers and sisters of the whole blood, and the legal representatives of such of the whole blood as are dead, shall inherit the real estate in fee simple, and the personal estate shall be distributed equally between the brothers and sisters of both the whole and half blood, or their representatives; but if there are no lawful issue, widow, father or mother, brothers or sisters, *or their* representatives, of the whole blood, then *brothers and sisters of the half blood*,* shall inherit the said real estate in fee-simple, and the personal estate absolutely, the estate both real and personal to be held by them, as tenants in common, in equal parts, except such parts of the real estate as came to such intestate by descent, devise, or gift, of some one of his or her successors, in which case, *all those who are not of the blood of such ancestor shall be excluded from such inheritance and such part of the real estate.*

* [N. B. This act *omits* the provision of the former one "and *their lawful issue.*"]

The former of these acts—the one passed in 1794—was the first ever passed in Pennsylvania, which let in half blood as heirs to realty; and prior to the date of it, 'the heir-at-law,' under the statute laws of Pennsylvania, of a person situated as was

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Statement.

the testator hereafter mentioned, would have been the same person as 'the heir,' according to the common law of England; it having been established in Pennsylvania, until 1833,—when it was enacted by a statute of the Revised Code, that the heir at common law should not take, in any case, to the exclusion of other heirs and kindred standing in the same degree of consanguinity with him—that the common law here takes in all cases not provided for by statute.

Before either of the laws was in existence, st., in December, 1791, Mathias Aspden, a person born in Pennsylvania, and who, according to evidence ordered by the Court to be taken, extrinsic to his will, was found by a verdict on a feigned issue ordered by this Court, to have been *domiciled* there also;* but who, as was shown by the same testimony, left this country at the beginning of the Revolution, and lived nearly all his life afterwards in England, and died there in 1824—made his will, a short and informal instrument, penned by himself. He gives "*my* estate, *real* and personal to *my* heir-at-law; *first* paying all my just debts and funeral expenses," and certain pecuniary legacies hereinafter mentioned. And in a postscript, referring to some doubts,—which he remarks were ill founded—as to his legitimacy, says, "It is my will that my estate, real and personal, to the party who would be *my lawful heir* in case there might arise no doubt on that head."

* White v. Brown, 1 Wallace, Jr., 217.

The pecuniary legacies above referred to, were small legacies to each of the children of his half brother, Benjamin, and his half sister, Ann, living at the time of his death; to his half sister, Bersheba, and to his half brother, Roger.

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At the time he made his will, he had, besides these, as was proved by testimony extrinsic to the instrument, and received subject to exception, a half sister, Rebecca, and a half brother, James, neither of whom he mentions. This evidence showed that he had long maintained feelings of great animosity to this brother; that Rebecca was living in 1791, when he made his will, but died in 1814, leaving seven children; that Benjamin was dead prior to the date of the will; that Beersheba was married in 1761, and died about 1817, leaving five children; that Roger died between 1802 and 1814, leaving twelve children; and that Ann had died in 1769, leaving four children. None of these dates or items are specially important.

The will was *made in Pennsylvania*, and executed so as to pass real estate in *that* commonwealth, but *not* so as to pass such estate *elsewhere*. It had *Pennsylvania executors;* one of whom was to be the president "*at the time being*" of a *bank in Pennsylvania;* and *it remained in Pennsylvania* from its date in 1791, till the testator's death in England in 1824.

A very particular account is given of the testator in another case,* where the question of his domicil was in issue; and it will perhaps make the comprehension of the present case more perfect, if the reader will refer to it. He was a strange, disordered and unhappy individual; a monomaniac, in short, and a fool in every thing but amassing money. As already stated, he left this country in 1776, and died abroad in 1824. He was never married, and left neither father nor mother; brothers nor sisters of the whole blood, nor any descendant of them; nor *brother nor sister of the half blood.* He did however leave *de-*

* White v. Brown, 1 Wallace, Jr., 217.

scendants of these last, and between them and his heir at the common law, this suit was raised about his estate, which, from the time of his death in 1824, had now grown, under the care of an *American* Chancery, from its original amount of $250,000 to about three times that sum. The relatives whom he left were, as proved by extrinsic evidence,

I. Nephews and nieces, named Harrison, the descendants of a half sister on his *mother's* side.

II. Nephews and nieces, named Hartley, &c., the descendants of half brothers and sisters on his *father's* side.

III. His heir at the common law of England, John Aspden, of that county; the oldest son of his paternal first cousin, the latter person having been alive at the date of the will, 1791, but not alive at the testator's death in 1824.

The first and second parties stood, therefore, in equal nearness with each other, being each the issue of half blood brother and sisters; and both in greater nearness than the third party, John Aspden, whose superiority to them consisted in his being of the whole blood. *The two former parties were also the testator's next of kin.*

The whole of the large estate above spoken of was *personal.* The history of the testator's *real* estate, as it was proved by evidence extrinsic to the will, and which the Court directed to be taken, was peculiar. Neither at the date of his will, nor afterwards, did he hold or claim any real estate acquired by *purchase;* nor any which came to him by descent from his *maternal* ancestors; but in the year 1765 he became by devise from *his father,* the owner, in fee, of a house and lot in Philadelphia, and of a farm in

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Chester county, *which he never aliened.* He continued in possession of this paternal real estate till 1781, when, he having fled the country, and gone to Great Britain, it was seized and confiscated under an attainder for an alleged treason. The legality and moral justice of this attainder, the testator always afterwards vehemently denied; maintaining that he had done nothing whatever to justify it, and that it was void. In a will made nine years after the confiscation, and long after every chance of recovering practically either estate had passed away forever, and within a few months of making the present will, he devised both these estates specifically, one to one person, and the other to another; speaking of each of them as *my* estate, &c., "which has been unjustly seized and confiscated, under pretence of high treason." These pretensions and claim of legal ownership and control of these estates, though palpably absurd, to all practical objects, were always pertinaciously maintained by the testator, who seemed to consider this confiscation as the great event, and the greatest wrong of his life. And he ever entertained the hope—or at least so said—that his heir, if not himself, would gain it; it being a thing, as he said in 1796, "which interests the public, and also *my heir at law*, who has his *right* in this case, and *cannot lose it.*"

Aspden's paternal grandmother bore the distinguished English name of *Scroop*; a matter of which he boasted; having, as he said, "a right to seal with a feather." And his English feelings were supposed to be proved by a letter to the Hon. Thomas Willing, of Philadelphia, in which he speaks *of an heir at law to an estate* to bear *the port of a gentleman.* In a petition for redress to the legislature of Penn-

sylvania, asking relief about his confiscated property, he says that "*his heir at law in England*" is entitled to £5,000 damages for the chance he has lost of getting his estate. Among the few books which he ever owned was Blackstone's Commentaries, in which the term 'heir-at-law,' in the chapter on Descents,* is explained to be the heir by the common law of England.

* Vol. 2nd.

All these facts, as well as his belief and pretensions of ownership of the real estate, were proved of course by evidence extrinsic to the will, which the Court had not *ordered* to be taken, and which was therefore taken subject to exception.

Upon this state of facts, the two parties of the half blood, st. the Harrisons, *ex parte paternâ*, and the Hartleys, *ex parte maternâ*, united to contest the right of the heir at common law, John Aspden, of England; and having defeated his claim, then contested the case with one another; the Harrisons, heirs *ex parte paternâ*, claiming the *whole* estate as being the persons to whom the testator's real estate would have descended had he owned it; while the Hartleys, heirs *ex parte maternâ*, claimed to share the estate with them; because, in point of fact, there was *no* real estate *ex parte paternâ*, to change the direction from heirs general to heirs on the father's side.

In the course of these contests, which occupied the Court for many weeks, the following questions arose: The first *five* questions arising between the heir at common law, in opposition to both the parties of the half blood; and the *sixth* arising only after the claim of the heir at law was disposed of *against* him; and therefore arising between the two parties of the half blood alone.

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1st Question. Repeal of 11th § of Act of 1794.

I. Whether the 11th section of the act of 1794 was repealed by the 7th section of the act of 1797? for if it was, then there being no heir fixed by statute (the parties claiming here being but the *issue* not mentioned in the act of 1797 of brothers and sisters of the half blood), John Aspden, as heir at the common law, came in under the term 'heir-at-law;' the case being an omitted one, and there being no other law to provide for him.

2nd Question. Meaning in Pennsylvania of "heir at law."

II. Supposing this 11th section not so repealed, and that by the *statute* law of Pennsylvania, the issue of the brothers and sisters of the half blood would succeed, what, in Pennsylvania, is meant by 'heir-at-law?' Does it mean heir at the common law, or does it mean heir by the statute law of Pennsylvania? If it mean the former, John Aspden would still take in preference to the Harrisons and Hartleys.

3d Question. At what date does the will speak?

III. Supposing this 11th section of the act of 1794 unrepealed, and that since the passage of that act, the term 'heir-at-law,' strictly and in its most accurate sense, means statutory heir, and so includes half blood; yet as the will was made before the passage of that act, and when, confessedly, the term had a different signification, and meant, both by the law of Pennsylvania and that of England, heir at the common law, Is the term to be taken according to the sense it had at the time of making the will, or does it attract to itself that new sense which the statute would give it?

4th Question. Effect of expression "*first* paying," and a provision, &c.

IV. Conceding that this 11th section was repealed, and that 'heir-at-law,' unexplained, means heir by statute law, and so includes half blood; and finally, that the will must be taken to speak at the *testator's*

Statement.

death, Does the fact that by the will the 'heir-at-law,' to whom the bulk of the estate was devised, *was first* to pay legacies to certain relatives, or the fact of a provision for them at all, show that these relatives, who were of the half blood, were not meant to be included in the term 'heir-at-law,' and so to show that the term was used in the common law sense, which does not include the half blood; and not in the Pennsylvania statutory sense, which does?

5th Question. Extrinsic evidence to explain testator's meaning.

V. Making all the previous concessions, and conceding in addition that the expression 'first paying,' is not enough to control the legal meaning of the term 'heir-at-law,' Does this term present a case of such ambiguity, as to its meaning in Pennsylvania, as that extrinsic evidence might be resorted to, to show that the testator used the term in the English common law, and not in the Pennsylvania statutory sense?

6th Question. Respective rights of heirs ex parte materna, and ex parte paterna.

VI. Conceding that the term 'heir-at-law,' as used in the will, means heir by the statute law of the State, and not heir at the common law of England; by which concession the right of John Aspden is disposed of, and the two parties, Harrisons and Hartleys, on opposite sides of the half blood, let in; Is the legal operation in favour of *heirs general* of the phrase 'giving and bequeathing all my *real* and personal estate to my heir at law,' changed so as to operate in favour of heirs *ex parte paternâ*, by the fact that the testator, some years prior to the date of his will, received by devise from *his father* real estate, which *he himself never aliened*, but which had been, in fact and in law, confiscated by the State for his alleged acts of treason, the legality, *validity*, and moral justice of which attainder the testator ever strenuously

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denied; and which estate he always pertinaciously, though absurdly, *claimed* till the day of his death, to own and dispose of as his own; entertaining a hope, though an absurd hope, that his heir, if not himself, would some day gain it; it being a thing, as the testator warmly though absurdly said, in which his heir had 'rights,' and which "*he could not lose.*"

VII. Can evidence extrinsic to the will be received, to show his mistaken and absurd belief?

Counsel who argued.

The case was elaborately argued on the respective points, by Mr. *Randall*, Mr. *Budd*, and Mr. *W. B. Reed*, for the heir at common law;(A) and by Mr. *J. M. Read*, Mr. *Newbold*, Mr. *Meredith*, Mr. *H. D. Gilpin*, and Mr. *W. M. Tilghman*, for the statute heirs. Mr. *Read* and Mr. *Newbold*, after the heir at common law had been disposed of, arguing for the heirs *ex parte paternâ*, the Hartleys, against their former colleagues, the remaining gentlemen, who claimed the whole estate for their particular clients, the Harrisons; heirs *ex parte maternâ*.

Argument of the Heir at Common Law.

I. *The seventh section of the act of* 1797 *repeals the eleventh section of the act of* 1794.

In the attempt of the act of 1794 to provide for the *issue of* half blood, the first law which let in half blood at all, the legislature adopted a rule of preference over the more remote kindred of the whole, productive of great embarrassment in its application, and calculated to make titles dependent on facts often difficult to be ascertained. In this new canon

(A) Mr. *W. L. Hirst* represented certain Packers as next of kin of the whole blood, who originated the suit, but on the appearance of nearer heirs, the Court considered their pretensions as palpably without foundation. Much of Mr. *Hirst's* argument supported the case of the heir-at-law, and is incorporated with the argument on that side.

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of descents, what rule was to determine the remoteness of degree?* The merit of the *issue* of brothers and sisters of the half blood might not be so apparent; the sympathy which justified a provision for the one did not operate so strongly in favour of the other; and there was evidently no good reason for giving the preference an indefinite extent. The language of the 11th section of the act of 1794 was too loose for correct legislation, and accordingly, in the enactment in the 7th section of the act of 1797, the objectionable clause giving the estate to the issue of brothers and sisters of the half blood, in preference to more remote kindred of the whole blood, is omitted. The new section is skilfully drawn. The word 'representatives' occurs twice in the context. The omission to insert it in the giving clause in an act designed to perfect a code proved not satisfactory by experience, is pregnant with exclusion. The legislature, in so remote a case, might well mean to admit its inability to provide any rule always satisfactory, and to let in again the heir at common law, as a person as good as any. The common law was our possession and our glory; and except in the preference of the eldest son, and the exclusion of daughters, its canons of descent have never been odious.

* See Christian's Note to 2 Blackstone's Commentaries, ch. 14, p. 240.

1st Question, Repeal of 11th § of Act of 1794.

A subsequent statute revising generally the subject-matter of a former one, impliedly repeals it. A 'supplemental' act may supply an act *in toto*, as well as in part. A 'supplemental' act, punishing a crime by imprisonment for ten years, would repeal one punishing the same offence by imprisonment for five years and fine. In a Massachusetts case,* a former act having provided for a case, its subject-matter was provided for again by a new act, which omitted

* Bartlet v. King, 12 Massachusetts, 536, 545: and see Weatherford v.

Ap'l Sessions, 1858.

Argument of the Heir at Common Law.

some of the *restrictions* and *limitations* of the former act; yet the Court considered that the old act was repealed *in toto*. Here the act of 1797 does legislate upon the identical particulars provided for by the act of 1794. Up to a late point in the new section, it re-enacts the provisions of the old one; an omission easily accounted for, and restoring the ancient law in *that* particular alone. Can the omitted words thus left out, be hunted up from the context of obsolete enactments, and be brought up in their dismembered state to have the force of law?

Weatherford, 8 Porter, (Alabama), 171; Carter v. Hanley, Wright, (Ohio), 74; Mackey v. Hodgson, 9 Pennsylvania State Reports, 470.

But even if this eleventh section of the act of 1794 is not repealed, still John Aspden, of England, takes, for—

2d Question. Meaning in Pennsylvania of "Heir at Law."

II. '*Heir-at-law*' *means in Pennsylvania*, '*Heir at the common law.*'

In *Johnson* v. *Haines's Lessee*,* in 1799, a question arose between certain brothers and sisters, and a party who was heir at the common law. The counsel or reporter speak of this latter person as "heir at the common law." The opinion of the Supreme Court came up on error to the High Court of Errors and Appeals; a tribunal still higher, then existing, now abolished. It was the most solemn and august judicature ever known in Pennsylvania. The Chief Justice of Pennsylvania, McKean, delivered its unanimous opinion, and notwithstanding the technical language of counsel, as already given, was yet sounding in his ears, twice speaks of that same party as the "*heir-at-law*," and speaks of him in no other way. In *Jenks* v. *Backhouse*,† in 1803, a party similarly situated, is styled by reporter, one counsel and the Court, "heir at the common law." And the counsel, quoting an English case, speaks of "the heir-

* 4 Dallas, 64.

† 1 Binney, 91.

Argument of the Heir at Common Law.

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at-law." In *Cresoe* v. *Laidley*, in 1810,* the reporter styles him in one place, "heir at common law," and in another, "heir-at-law." Mr. *Rawle* and Mr. *Lewis*, counsel of the party, call him once "heir-at-law," once "common law heir," and once "the heir." Mr. *Binney* and Mr. *Hopkinson* replying, call him once the "heir-at-law," and once the "common law heir." Chief Justice TILGHMAN in delivering the opinion, calls him three times "heir at common law," and once "heir-at-law." In *Bevan* v. *Taylor*, in 1821,† Judge DUNCAN styles him once "heir at common law," and once, apparently, "heir-at-law."

This convertible language is also the language of legislation. In one section of an Act of Assembly of 1705,‡ the phrase "next heir, according to the course of the common law," is used; and also, "heir-at-law, according to the course aforesaid." In another,§ (younger children being spoken of,) the oldest son—being in reference to them truly heir at the common law—is spoken of as "the heir-at-law;" and the term is used several times in the same way, in a supplemental act of 1764.‖

There is no doubt that until the statute of 1833 was passed, the heir at common law occupied in Pennsylvania a prominent and favoured position, and that he was recognized by the Courts as the person always to take, except in every case where the statute has stripped him of his rights. "It must be remembered," says Chief Justice M'KEAN,¶ "that the system of distributing real estate in cases of intestacy, is an encroachment on the common law; and whenever such an encroachment takes away a right, which would otherwise be vested in the *heir-at-law*, the operation of the statute should not

* 2 Binney, 279.

† 7 Sergeant & Rawle, 397.

‡ § 8, 3 Smith's Laws, 158.

§-§ 11, id.

‖ § 4, id. 160.

¶ Johnson v. Haines's Lessee, 4 Dallas, 64.

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be extended further than the very words of the legislature."

In England there is descent in gavelkind, to all the sons, and descent in borough English, to the youngest son; and these inherit there by the law of special custom, just as all the children do here by special statute. Yet the term 'heir-at-law,' which is not more correct, by strict language, in England than it is here, runs throughout books common to both countries, as a phrase commonly and rightly used to indicate the "heir at common law."*

*2 Blackstone's Commentaries, 201; 2 Cowper, 661; 3 Barnewall & Adolphus, 453; 4 Moore & Payne, 862.

The common law being the general law, must generally be referred to, just as it generally governs. It is the nursing mother of us all. "In Pennsylvania," says the Court in *Hileman* v. *Bouslaugh*,† "a testator is to be considered as speaking in reference to the common law system of descents."

† 13 Pennsylvania State Reports, 344.

Nor is the force of this expression 'heir-at-law,' qualified by the expression '*lawful* heir,' in another part of the will. If there be any want of precision in the phrase "lawful heir," when applied to a devise of real estate, it cannot qualify or obscure the meaning of the better defined term, "heir-at-law." An ambiguous phrase cannot be used to explain, but must itself be explained by one free from ambiguity. But standing alone, 'lawful heir' means heir *jure hareditatis*, right heir, own heir, or heir-at-law. In *Davies* v. *Lowndes*,‡ which will be much relied on by the other side, when they divide and come to a contest between themselves, the testator uses the terms convertibly; meaning to indicate heir by the common law. The term, however, is used by Aspden in connexion with a doubt about his own legitimacy; just as a man speaks of his lawful child, in opposition to

‡ 4 Bingham's New Cases, 478.

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Argument of the Heir at Common Law.

one not lawful, or illegitimate, or his lawful wife, in contrast with a woman to whom he may have been allied by ties less regular. What he *meant*, was 'the party who would be my heir in case I was lawfully born.' But he has confused his ideas, and therefore misuses his words; as is obvious from the sentence, which expresses *no* idea with correctness of language.

3rd Question. At what date does the will speak?

III. *Conceding that the argument on neither of the preceding points is well founded, still the heir at common law takes; for, confessedly, he was 'heir-at-law' when the will was made. And the will must refer to the law as it then was, and not to the law as it might thereafter be changed.*

In this point of view the domicil is not material; for the laws of England and Pennsylvania were on this point the same in 1791, when the will was made.

The testator has not given any reason to believe that he intended to leave his estate to such person as the laws of Pennsylvania from time to time might, could or would direct, to be the party or parties to whom the estate of an intestate should go. We cannot interpolate into the will an intention that during thirty-three years, in which it remained unchanged, the disposition of the testator's property should depend on these varying laws. In 1791, he declared his last will to be, that his estate should go to his 'heir-at-law.' The will was never revoked. The heir-at-law was a person perfectly defined. He was the person who should, at the time of the testator's death, be nearest in blood and descent from a common ancestor, of the full blood, by his father's side. John Aspden, heir at the common law, now

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Argument of the Heir at Common Law.

3rd Question. At what date does the will speak?

claiming, answers that description. No one else does. This declaration made in 1791, the law repeats for the testator *in articulo mortis*.

In *Martindale* v. *Warner*,* the Supreme Court of Pennsylvania has authoritatively settled this point. Between the making of the will and the death of the testator, the law in 1844 was changed, and the Court determined that the law in existence at the time of the execution of the will must govern, without regard to the kind of property. "Though a will, it is true," says Judge ROGERS, "does not take effect until after the testator's death, yet it is inchoate, though not consummate from the execution of it, and for many purposes in law (of which this is one, it relates to the time of the making." "I do not put the case," he says, "on the actual intention of the testator, but on his legal intention, which is the only safe rule. That the testator permitted his will to stand without alteration for several years, or that he may have known of the act of 1844, is nothing. It is a question of construction, depending on certain fixed principles, which ought not to be varied by forced speculation as to the knowledge or ignorance of testators, some of whom may, or others may not know of the statute and its legal construction."

* 15 Pennsylvania State Reports, 479.

So in another Pennsylvania case,† it was held that a statute "which provides that real estate acquired by the testator after the date of his will, shall pass by a general devise, does not apply to a will dated before its passage." The Court says it could only be so applied "by giving the act a retroactive effect, which will never be done, where such does not expressly appear to be the design of the legislature; but the act will be left to operate on wills made and

† Mullock v. Souder, 5 Watts & Sergeant, 198.

executed after the act comes into operation. A devise of real estate," it continues, "is in the nature of a conveyance; and a statute will not be considered as altering the effect of a conveyance already made, so as to pass more than it purported to pass when made. A retroactive effect will not be given to a statute so as to affect contracts or property. In the case of *Ashburnham* v. *Bradshaw*,"* it says, "a devise to charitable uses was made by a will dated in 1734. The testator lived till July, 1736, a month after the mortmain act had been passed, and upon a case, the judges certified that the devise was good. And to the same effect are *Attorney-General* v. *Lloyd*,† and *Same* v. *Andrews*.‡ There the application of the statute would have abridged the rights of the devisee; here it would abridge the right of the heirs; and there seems no difference in the principle."

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Argument of the Heir at Common Law.

At what date does the will speak?

* 2 Atkyns, 36.

† 3 id. 551.

‡ 1 Vesey, 225.

The English authorities also adopt the same law.

Lord C. J. Willes says,§ that it is an established rule "that the intent of the testator ought always to be taken as things stood *at the time of making his will*, and is not to be collected from *subsequent* accidents, which the testator could not then foresee." In a much later case,|| Holroyd, J., says that "it is laid down by Willes, C. J., in delivering the judgment of the Court of Common Pleas, to be one of the certain and established rules for the construction of wills, that the *intent of the testator* ought always to be taken as things stood at the time of the making of his will. This rule had been *before* laid down by Lord C. J. King, in *Wright* v. *Hall*, and has been since confirmed by Lord Ellenborough in delivering the judgment of the Court of King's Bench in *Doe* v. *Scott*."¶ Lord Ellenborough, quoting and adopt-

§ Doe d. Morris v. Underdown, Willes, 297.

|| Doe d. Winter v. Perratt, 5 Barnewall & Cresswell, 69.

¶ 3 Maule &

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At what date does the will speak?

Selwyn, 306; and see Winter v. Perratt, 9 Clark & Finnelly, 606.

ing the opinion of Lord King and Lord Willes, says, "though the will is not complete until the death of the testator, so as to vest anything in the devisee, yet the intent of the testator is to be taken to be as things stood at the making of his will; for the testator makes his will as if he were to die that moment."*

"It is the intention of testator," says Mr. Ram,† "at the time he makes his will, which alone the law will carry into effect. Events which have happened since the publication of a will, are unavailable to introduce an intention into it." Again—"It has been said by Lord Hardwicke, and it is often repeated, that a will must be made to speak from the testator's death, and be looked upon, not only as his last will, but his last words. It is true, that a will speaks from the death of the testator; but what does it speak? Does it say more than what the testator said when he made his will? Were it permitted to say more, clearly the law would fulfil an intention which is not expressed in it."

If the testator, after making his will, should become insane, and continue so to the time of his death, could a change of intention, arising out of a change of law, which he had no capacity to counteract, be imputed to him?

If A. devises 10*l.* to the parish where he lives, and afterwards removes his habitation to another parish; the parish where he lived at the time of the will, shall have the legacy.‡

IV. But conceding the arguments on all the foregoing points to be ill founded, the direction of "*first* paying to the testator's *half* brothers and *half* sisters certain pecuniary legacies," controls the otherwise

* 3 Maule & Selwyn, 306.

† On Wills, 107, 108.

‡ 2 Comyn's Digest, Tit. Chancery, (3 Y. 16), p. 679. 4th Question. Expression "*fir*

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Argument of the Heir at Common Law.

Expression "*first* paying."

settled meaning of the term "heir-at-law," and gives it a common law as distinguished from a statutory sense. Using the term "heir-at-law," to mean heir at the common law, that person could very well *first* pay pecuniary legacies to persons of the half blood; for no person of the half blood could be "heir-at-law," in the common law sense. But using the term in the Pennsylvania statute sense, which, violating the rule of common law, prefers nearer half blood to more distant whole blood, an estate of half a million is divided between, or at least includes, parties who are *first* to pay themselves *a few dollars* as a specific legacy. The construction of the other side defeats this plain and *positive* direction. If the half blood inherits, there can of course be no previous payment, nor any payment. If the heir at common law inherits, there can be. One construction carries out a plain direction; the other directly defeats it, by rendering it impossible.

Independently of the expression "*first* paying," &c., these provisions in favour of half brothers and sisters, &c., are forcible to show that even if naturally or by force of terms they are included, they are not included by the testator's *meaning*. The authoritative case of *Finlay* v. *King*,* is much in point. Delivering the opinion in that case, Chief Justice MARSHALL, quoting the terms of the devise, which were very stiff and difficult to manage, says: "These words (the devise) certainly import that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be contracted only by a strong and manifest intent to be collected from the whole will. *But the intent of the testator is the codicil*

* 3 Peters, 377: and see Darbison v. Beaumont, 1 Peere Williams, 229; Spring v. Biles, 1 Term, 435, note; and Doe v. Parratt, 5 Barnewall & Cresswell, 48.

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Argument of the Heir at Common Law.

Expression "*first* paying.."

Effect of a provision for the half blood.

rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule, often it must prevail; although in giving effect to it, some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence." And that strict lawyer, whose mind was itself law, went on to infer a particular meaning from exactly such indications as we seek to infer it from; to wit, that having already made a provision for certain parties, he did not mean to provide for them again by operation of law.

"The father," he says, "who was the presumptive heir when the will was made, died during the life of the testator. This event is supposed not to affect the construction of the will. But were it otherwise, were it supposed that he might look forward to that event, and contemplate his brothers and sisters as his probable heirs, *the will furnishes arguments of great weight in support of the opinion that he did not intend them to take anything not expressly devised to them.* The heirs of the testator, at the time of his death, were, a brother of the whole blood, a sister of the whole blood, the daughters of a sister of the whole blood, a brother of the half blood, and a sister of the half blood. *Each of these persons is named in the will. For some of them ample provision is made. To others less favour is shown. The legacies to his brothers and sisters of the half blood are inconsiderable, while the bequests to those of the whole blood are large. No one of them is omitted. The circumstance that his mind was clearly directed to each, and that he has carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate*

Argument of the Heir at Common Law.

5th Question. Admission of extrinsic testimony to explain the will.

powerfully against the opinion that he intended to leave a very large property to descend upon them by the silent operation of law."

V. Conceding, 1. That the 11th section in question is not repealed; 2. That in a strict legal and correct Pennsylvania sense, 'heir-at-law' does not mean heir at common law; 3. That the will must refer to the meaning of the term at the testator's death in 1824, and not at the date of the will in 1791; and finally, that there is nothing in the will itself which controls the statutory meaning, still have we not shown that the expression was so capable of being used, and was in fact so often and so generally used in the common law sense also, that we may now resort to the extrinsic evidence of the testator's situation and circumstances, to show in what sense *he* used it? We seek to show no more than that Mr. Aspden has used a law term in the identical sense in which Chief Justice M'Kean and Chief Justice Tilghman, on the bench, and Mr. Rawle, Mr. William Lewis, Mr. Binney, and Mr. Hopkinson, at the bar, all of them speaking on a law subject, also used it. Admit that he might have meant heir by some statute law not then existing, but which might be enacted any time before his death; still, as the most eminent lawyers in this State have used it in another sense, may we not prove that Aspden fell into the same error, negligence, inaccurateness of style, or whatever else you choose to call it, the question being on a will, and a question of intention merely?

Independently of the question of domicil, and *admitting a technical domicil in Pennsylvania*, cannot we show, in construing a word of such doubtful

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Argument of the Heir at Common Law.

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Argument of the paternal half blood.

meaning, that in fact he lived all his life in England or in an English colony; that he had highly aristocratic feelings, boasting of his descent from the Scroops; speaking, as in his letter to Mr. Willing, of an heir at law to bear the port of a gentleman; that among the very few books he ever had was Blackstone's Commentaries, in which heir-at-law is used in one sense, and had no book in which it is used in another; that he always lived in hostility with the person to whom one construction of the term would give his estate, and always manifested vanity and pride in another person, whoever he might be, that would get it by another? That he discriminated among his step-brothers and sisters and their families, bestowing legacies with clear indications of difference, and excluding the one through whom some of these parties now claim.

To enlarge upon these last facts as explanatory of the sense in which he used the doubtful term *heir-at-law*.

The testator *ex*cluded his *step*-sister Rebecca, then living, but who died about 1814 leaving seven children. He also *ex*cluded his *step*-brother James Hartley, because he was on bad terms with him. He *in*cluded the children of his *step*-brother Benjamin, who had previously died leaving seven children. He *in*cluded his step-sister Beersheba previously married and now having children, *none* of whom did he *include*. He *included* his step-brother Roger, who died between 1802 and 1814, leaving twelve children, none of whom did he *include*. He *included* the children of his step-sister Ann, who had died in 1769, leaving four children; but as to her children, and as to the children of Benjamin, he limited the legacies

expressly *to such of these children "as should be living at the time of his death."*

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In view of this discrimination and these limitations, can we not show that the testator did not intend to bequeath the mass of his fortune to his step-brothers and sisters and their children, under the description of *my heir at law?*"

Admission of extrinsic testimony to explain the will.

But without so much detail. A domicil merely technical, unaccompanied by actual residence, cannot furnish a satisfactory explanation of the testator's intentions. It was in the place of his residence that he acquired ideas and language. The presumption is, that he used words in the sense in which they were there understood. Cannot we show that the testator was educated in England, and lived there the greater part of his life, and so infer that the term 'heir-at-law' was used in an English sense.

The authorities, which give to the law of the domicil the supremacy, relate to the execution of wills, and to the transmission of property, in cases of intestacy, or when, in consequence of some positive law, the provisions of a will fail to take effect. They do not relate to the *interpretation* of wills, except where *residence* is combined with the technical domicil. Mr. Burge,* in speaking of the rule, that the law of the domicil affords the rule of construction of wills, says, "The ground on which this rule rests is, that, as it becomes necessary to ascertain the sense in which the testator has used the expression, and what law of succession he contemplated, it is presumed that they were those of the country in which he was domiciled, because, it must be supposed, he was familiar with those laws. There are grounds for presuming he was acquainted with them, but

* Conflict of Laws, vol. 4, 590, 591.

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there exist no grounds for presuming him to be acquainted with any other laws of succession. In affixing the sense in which he has used certain words, terms, or phrases, he is presumed to have adopted that which prevailed in the place of his domicil. It has been sometimes said, that they ought to be understood in the sense in which they are accustomed to be used in the place where the will or contract was made. But it would be impossible to consider this as a general rule, *for the residence of the party in the place may have been for so short a time* as to negative the presumption, that he was even acquainted with that sense." Story* says that the will is to be construed according to the "law of the place of his *actual* domicil," evidently excluding the mere technical domicil, without residence, like that which the Circuit Court imposed on Mr. Aspden.

* Conflict of Laws, § 479, f.

Courts having in view, therefore, not a technical but an actual domicil, of which residence is the essential feature, with a view to ascertain the sense in which the testator used the language of the will, cannot we point to his education and long residence in England, as furnishing evidence that the words of the will were used in the English sense?

Argument of the paternal half-blood.

6th Question. To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

VI. *Argument for the paternal half-blood.*—Supposing all the foregoing points to be decided against the heir at common law; that his pretensions are thus finally disposed of, and the half-blood let in as 'heir-at-law,' a new question arises, one between the half-blood itself. To which side of the half-blood, or how amongst it, does the estate go? *Does it go to the paternal side alone; or to the maternal, in common with it?* We contend for the paternal.

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Argument of the paternal half-blood.

To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

By blending the personal estate with the real, the testator bequeathed both to the heir of the real estate. In order to ascertain the heir to whom the real estate is devised, it is necessary to know what real estate is referred to in the will, and extrinsic evidence is admissible and has been directed to prove that fact. Such evidence shows that the real estate referred to in the will, was the testator's *paternal* estate, and the will is therefore to be read as containing a specific devise of that estate. So reading the will—and in the absence of proof, that the testator owned or claimed any other real estate, at or after the date of the will—its true construction is, that the heir described is the party who, at the testator's death intestate, would be capable of inheriting the *real estate referred to in the will.* The Harrisons alone, were so capable of inheriting *that* real estate, and, as the heir described, are alone entitled to the personal estate.

The fact that the testator was out of possession of his real estate at the date of his will and afterwards, has no bearing upon the case; inasmuch as the term "heir" is used in the will merely to describe the legatee of the personal estate, and that description is rendered just as certain by a reference to the course of descent of an estate of which the testator was out of possession, as it would have been by a reference to the course of descent of an estate of which the testator was in possession. Neither the state of the possession of that real estate, nor the condition of its title, at or after the date of the will, affect in any way the description of the heir of that estate, contained in the will; and as the condition of that real estate, in so far as regards the acts of the testator

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himself, *was the same at his death as at the date of the will*, there is no ground for any inference that the kind of heir to which the description pointed, at the date of the will (to wit, the party upon whom the law at the testator's death, intestate, would cast the inheritance of *that* land, as *his* heir,) at the date of the death no longer answered that description. In a word: By the devise of *his* real estate to *his* heir, the testator *at his death* described the heir of *his* estate, and did not describe a party who by *no possibility could ever inherit that estate.* This is the strict legal construction of the will, and all the extrinsic facts having a legal bearing upon the subject, strengthen that construction: it being clear that it was the testator's idea that the *heir* of his confiscated real estate, *as heir*, had rights to that estate which he "*could not lose;*" and as the restitution of those rights was the absorbing object of the testator's life, at and after the date of the will, the bequest of the personal estate to *that* heir, would under such circumstances, be a disposition much more in accordance with the testator's views, than would a bequest of it to a party who *never could be such heir.*

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These positions we fortify by authorities.

1st. By blending the personal estate with the real, the testator devised and bequeathed both to the heir of the real estate.

In *Gwynne* v. *Muddock*,* a testator gives "all my real and personal estate" to A. W. for life, "and my nighest heir-at-law to enjoy the same after her death." Upon the death of A. W., the *next of kin* of the testator claimed the personal estate, on the ground that the description "heir-at-law" must be considered with reference to the nature of the pro-

*14 Vesey, 488.

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perty; and therefore applied to personal estate, must mean the next of kin; according to the opinion expressed by Sir R. P. Arden, Master of the Rolls, (though not a decision) in *Holloway* v. *Holloway*.*

The Master of the Rolls (Sir Wm. Grant,) after taking time to consider the case, gave his decision as follows:

"I have not found any case directly applicable: but there is no doubt the heir-at-law, properly and technically speaking, may take personal property bequeathed to him by that description. It is always a question of intention what the testator means by the use of such a description. Where two descriptions of property are given together in one mass, then the difficulty arises, who is meant; for both the next of kin and the heir cannot take; unless this construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate; and the heir-at-law the real estate. But in this case the testator could not mean that; for he blends all the real and personal estate together; and after the death of Ann Williams, directs that his nighest heir-at-law shall enjoy the same. As both are to be enjoyed together, it is absolutely necessary for the Court to say who shall enjoy both. It would be contrary to the intention to divide them; and it would be contrary to the words to give the whole to the next of kin. Therefore, the Court has no alternative, but to adhere to the words of the will, and permit the person who answers the description of heir-at-law, to enjoy the whole."

The decree accordingly declared the heirs-at-law were entitled to the capital, and the accumulation

* 5 Vesey, 399.

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since the death of the tenant for life, Ann Williams.

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In *Mounsey* v. *Blamire*,* the language was, "to my heir £4000," and three co-heiresses of the testator were held to be entitled, Sir J. Leach, Master of the Rolls, observing, "where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, there it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word heir."†

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* 4 Russel, 384.

† And see Davies v. Lowndes, 4 Bingham's New Cases, 478.

2nd. In order to ascertain the heir described, it is necessary to know what real estate the testator referred to in his will, and extrinsic evidence is admissible to prove that fact.

It is an elementary rule, that extrinsic evidence is always admissible "in order to ascertain what is comprehended in the terms of a given description, referring to an extrinsic fact."‡

‡ 1 Jarman on Wills, 367 and 370, and cases.

It will be contended, that the terms of description here used ("my estate real,") are only applicable to real estate of which the testator was actually seised, or to which he had an indefeasible title; and that although evidence to identify *such* real estate may be admissible, yet no evidence can be received to show that the words used refer to real estate of which the testator had been disseised, or his title divested, but of which he still asserted himself the rightful owner.

Now it is well settled in Pennsylvania, that land of which a testator is disseised at the date of the will, is still *devisable*.

"Of the right of a testator to devise land of which he has been disseised"§ (says Chief Justice Tilghman, in a Pennsylvania case), "I think there can be no

§ Humes v. McFarlane, 4 Sergeant & Rawle, 435.

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question. The tenures attached to the feudal system never having prevailed in *Pennsylvania*, we have paid no regard to that principle of the English law, which requires seisin in order to authorize the alienation of land by deed or will. Our statute of wills, made in 1705, enacts that "all wills in writing whereby any lands, tenements, or hereditaments within this province have been, or shall be devised, being proved by two or more credible witnesses, &c., &c., shall be good and available in law for the granting, conveying, and assuring of the lands or tenements thereby given or devised." In another case,* it was made a question whether one out of possession could convey land by deed, and decided in the affirmative. The following is an extract of the opinion delivered by the Court. "When deeds and devises of land have been considered by our Courts, it has never been made a question whether the grantor or devisor was in or out of possession; and to make it now would be to disturb what has been looked upon as settled."

* Stoever v. Whitman, 6 Binney, 416.

In the case first cited,† the testator had devised in these words. "I also give and bequeath to my sons John and Alexander, all that my messuage or tenement wherein I now live," &c. It appeared that the tract on which the testator lived had originally contained 200 acres, but that he had been dispossessed of part of it, containing 44 acres, under a recovery in ejectment by an adverse claimant, four years before the date of the will. The point was made, whether the testator's title to these 44 acres passed under the devise—and the Court said, "The the testator having devised 'all that messuage and tenement wherein he lived,' if the 44 acres now in dispute were at that time separated from the planta-

† Humes v. McFarlane.

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tion on which he lived, and he did not keep up his claim, they would not pass by the will; but if he did keep up his claim they might pass. It was a question of intention, involving a fact on which the jury might decide. Whether an estate passes, is matter of *law*, but where that estate lies, or what is the extent of it, is *fact*."

But again: The objection to the admissibility of this evidence rests wholly upon the assumption that the word "my," when used as a term of reference or description, is always to be construed in its strict and primary sense.

The answer to it is in the following extract from Mr. Wigram's Treatise on the Interpretation of Wills.*

* P. 42.

"*Proposition* III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, *are insensible with reference to extrinsic circumstances*, a court of law may look at the extrinsic evidence of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference* to these circumstances, they are capable."

This proposition is proved by the cases incidentally referred to in considering the second proposition. The most striking examples, perhaps, are those in which a popular or secondary interpretation has been put on the words *child*, *son*, *my* estate, and other similar cases. Thus the word *child*, though in strict construction it means a legitimate offspring, may be applied to an illegitimate offspring where the circumstances of the case make it impossible that the tes-

tator (who must have had some meaning) used it in such a strict and primary sense.*

So, *son* means an immediate descendant; where however, with reference to extrinsic facts, it is *impossible* that the word can have been used in such its proper sense, that construction of the word is of absolute necessity excluded; and the necessary inference that the testator used the word in some improper or inaccurate sense, lets in the inquiry in what sense the testator used it.†

So, property subject to a power, is not, strictly speaking, *his* by whom the power is to be exercised. Now, suppose a testator having no real estate at the time of making his will, but having a power over the real estate of another, to devise *his* real estate over to A. Every devise of real estate being specific, the facts of such a case would exclude the presumption that the testator had used the word *his* in its proper sense, and would let in the secondary and only other interpretation of which the word under the circumstances is capable.‡

3rd. The evidence shows that the real estate referred to in the will, was the testator's paternal estate.

That real estate then, being that referred to in the will, it follows that *we are to read the will as containing a specific devise of that real estate.*

4th. Thus reading the will, and in the absence of proof, that the testator owned or claimed any other real estate at or after the date of the will, its true construction is, that the heir described is the party who, at the testator's death intestate, would be capable of *inheriting the real estate referred to in the will.*

As a general rule, in every limitation of an estate

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* Wilkinson v. Adam, 1 Vesey & Beames, 422; Woodhouselee v. Dalrymple, 2 Merivale, 419; Beachcroft v. Beachcroft, 1 Maddock, 430; Bayley v. Snelham, 1 Simons & Stuart, 78.

† Steede v. Berrier, 1 Freeman, 292 and 477; 8 Viner's Abridgment, 310, pl. 9.

‡ Lewis v. Llewellyn, 1 Turner & Russell, 104; Napier v. Napier, 1 Simons, 28: Sugden on Powers, Ch. V. § 56, n.

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of inheritance by a grantor or devisor to his own right heirs, heir-at-law, or lawful heir, the law construes those terms with reference to the descendible quality of the estate limited, and considers them as designating the *heirs of the estate limited*, in contradistinction to the heir general.

Thus in limitations by deed by an heir *ex parte maternâ*, where the ultimate remainder is to the "right heirs" of the settlor, the term is construed to mean heirs *ex parte maternâ*.

* 3 Levinz, 406.

In an English case, *Godbold* v. *Freestone*,* "A man seised of lands by descent *ex parte maternâ*, makes a feoffment of them to uses, viz., of *Blackacre* to the use of himself for life, the remainder to his wife for her life, the remainder to the heirs of his body on his wife begotten, the remainder to his *right heirs*. And of *Whiteacre*, to the use of himself for 99 years, if he so long lived, the remainder to trustees for his life, remainder to his wife for her life, remainder to his first, and so to his tenth son in tail, remainder to him and his heirs; the husband and wife are both dead without issue; and if the heirs *ex parte paternâ* or *ex parte maternâ* should have the lands, was the question." Held that the remainder descended to the heirs of the feoffor *ex parte maternâ*, because the ancient fee remained in him. "'Tis all one, be the use expressed or not; the word heirs shall be heirs of the same quality as before." In another English case,† A. being seised in right of his wife of lands which she had by descent on the part of her mother, the husband and wife by deed covenanted to levy a fine, which was thereby declared should be to the use of the conusees and their heirs, to make them tenants to the præcipe, in order to suffer a common

† Abbot v. Burton, 11 Modern, 181; 2 Cruise's Digest, 402.

recovery; and afterwards such recovery was had accordingly; which, by the same deed, was declared should be to the use of the said A. for his life, and to his said wife for her life, and then to the first and every other son of their two bodies in tail male, remainder to the *right heirs* of the wife. A. and his wife died without issue; and the question was, whether the lands should descend to the heir of the wife on the part of the mother, or to her heir on the part of the father. Judgment was given in favour of the heir on the part of the mother. In a third English case,* F. W. having an estate by descent *ex parte maternâ*, on her marriage conveyed the same to trustees to such uses as she should by deed or will appoint: and in default of such appointment "to the only proper use of the *right heirs* of the said F. W., forever." By will, F. W. directed the estate to be sold, and inter alia, a legacy of £1000 to G. P., to be paid out of the proceeds. This legacy having lapsed by the death of G. P. during the life of the testatrix, it was held that it resulted as land unsold, and should go to the heir *ex parte maternâ*—per Buller, J. "The next question is, who is the heir-at-law entitled to take, the heir *ex parte paternâ*, or *ex parte maternâ*. It is admitted the estate came to Frances Weeks, by descent from her mother; and the question is, whether the settlement upon her marriage, by giving the ultimate remainder to her right heirs, gave them a new estate as purchasers, or the old uses remain. I think it was the old use." On a rehearing before Lord Thurlow, he "gave a clear and decisive opinion against the claim of the heir *ex parte paternâ* to the £1000.†"

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* Hutcheson v. Hammond, 3 Brown's Chancery, 128.

† And see Harris v. Bishop of Lincoln, 2 Peere Williams, 135; Watkins on Descents, p. 174.

That in a *devise* to the testator's own "heir-at-law,"

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or "lawful heir," the heir described is the party who, but for the will, would have taken by *descent* the *land devised*, is one of the main points decided in the great case of *Davies* v. *Lowndes*,* a case very similar to this. The testator, Selby, devised thus: "Next I give and devise to my *right and lawful heir at law* all my manors, &c., "to hold the aforesaid manors to my heir-at-law," chargeable with certain legacies, to be paid by his said "heir-at-law," within twelve months after his decease. "But should it so happen that no heir-at-law is found, I then do hereby constitute and appoint William Lowndes, Esq., my lawful heir, on condition he change his name to Selby. And I give the estates and all the manors beforementioned, &c., to the said William Lowndes"—chargeable with the legacies.

* 4 Bingham's New Cases, 478.

A part of the real estate thus devised had been purchased by the testator; part by his father, and part by his paternal grandfather.

It was held by the judges in the Exchequer Chamber, that the term right and lawful heir-at-law meant, "not any one who should be heir-at-law, but such heir-at-law as but for the will would have inherited the *whole* of the testator's property, whether purchased by *himself*, *his father*, or *grandfather*, and that *no one can claim under the devise, who has not this qualification.*" Lord Mansfield in 1780, Lord Loughborough in 1782, and C. J. Tindal in 1835, had all taken this view of the subject, but had all gone one step further. Relying upon some expressions in the context of the will, they all expressed the opinion that the heir described must not only be able to take by *descent* all the property devised, but that he must also be of the *blood of the Selbys*. The point did not

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arise, and was not decided, in either of the cases before Lord Mansfield and Lord Loughborough. But it did arise, and was decided in the case tried before C. J. Tindal. That part of his decision (that the heir must be of the blood of the Selbys) was reversed in the Exchequer Chamber. But the doctrine, that the heir described must be capable of taking by *descent all* the property devised, was *admitted* by the distinguished counsel for the defendant (Sir W. Follett), and most strongly affirmed by the Court.

"The judgments of Lord Mansfield and Lord Loughborough, on the same will," says Sir W. Follett, "were relied on by the Court below; but those judgments were given in cases in which neither of the claimants could be heir to the *whole* property. The reasoning of those judges only goes to show what is now admitted, that the heir whom the testator intended, was an heir who could take the *whole;* that he *might* be of the blood of the Selbys, but not that he *must.*"

"The cases of *Doe* v. *Lowndes,* in K. B. and C. P. (says Baron Parke, in delivering the opinion of the Court), in the time of Lord Mansfield and Lord Loughborough, were naturally pressed on us in the argument. We entirely concur in the decisions then pronounced, and in the general reasoning on which they proceeded; but it was unnecessary there to decide the point now presented for judgment. The lessors of the plaintiff, in neither case satisfied the necessary requisites of the devise. They could *not have inherited all the property.* Upon a careful perusal of the language used by those distinguished judges, it will appear that *the capability of taking all the property as heir* was the leading principle on

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which they proceeded; and any expressions importing beyond this, that the heir must be of the Selby blood, were either used somewhat loosely, as being of equivalent import, or certainly they were extra-judicial."

To apply this case to the one now under consideration. Suppose the whole estate devised by Mr. Selby had been derived by descent *ex parte maternâ* —and the plaintiff had been his heir general—but not of the blood of testator's mother, and therefore not capable of taking by inheritance the land devised? According to this decision, he would not have been the heir described—because the term right and lawful heir-at-law meant, "not any one who should be heir-at-law, but *such* heir-at-law as, *but for the will*, would have *inherited* the whole of the property" devised. "No one can claim under the devise who has not this qualification."

This case therefore fully establishes the position, that when a testator devises his real estate to his right and lawful heir-at-law, the heir described must be able to take by descent the land devised—he must be of the blood of the purchasing ancestor—and otherwise will not take, even although he be heir general.

There, the heir general would have taken by descent the lands which the *testator* had purchased; but inasmuch as he could not take by descent the *other* lands—as he could not make himself heir to the two other purchasers, testator's father and grandfather—he was excluded from the one estate which he could have inherited. So that instead of his character of heir general enabling him to take as a *purchaser* lands which he could not take by descent,

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the mere *possibility that there might be an heir who could take all three estates by descent*, was sufficient to prevent his taking what he otherwise would have been entitled to by descent.

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It is an elementary rule that "an heir-at-law is not to be disinherited without an express devise, or necessary implication." Yet by the construction contended for, the doubt, if there could be one, as to which of the senses the term heir is used in this will—heir general, or heir of the land devised—would be resolved so as to disinherit the heir.

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Apart from authority, the reason of the thing is wholly opposed to the construction claimed for the heir general. By such a construction, the testator is presumed, when in the act of devising *his* inheritance to *his* heir, not only to have no reference to the rules regulating the descent of the *inheritance devised*, but he is presumed to refer to the very opposite,—to the rules regulating the descent of some other inheritance, which he has not and does not devise. He gives *his* land to *his* heir; but by the construction contended for, the heir of that land shall not take it: he shall be excluded, in order that the heir general, who by law can by no possibility take the land devised, *by inheritance*, shall yet take it as *heir!*

5th. This exclusion of those not of the blood of the purchasing ancestor, has ever been a governing principle in the legislation of Pennsylvania. In the language of Mr. Justice Duncan,* "it was the manifest and declared intention of the legislature to preserve the line of descent in the blood of the ancestor from whom the estate came, for ever and for ever." "To me it is clear intention written in capital letters in the act of 1794, and the Explanatory Act of 1797,

* Bevan v. Taylor, 7 Sergeant & Rawle, 400.

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* Shippen v. Izard, 1 Sergeant & Rawle, 226.

that all who are not of the blood of the ancestor from whom the estate came, are excluded from the inheritance; however remote in degree the descent may be, the lines in which the estate came, are preserved *ad infinitum*, and the blood of the ancestor runs through every clause of these acts." "In this and other parts of the act" (says Yeates, J.,* referring to the 7th section of the act of 1794), "sedulous attention is shown that the property shall not go out of the line of the father or mother who acquired it respectively."

6th. It now only remains to consider whether the fact that the testator was out of *possession* of his real estate, or that his *title* to it was defective, at, or after, the date of the will, has any bearing upon the construction which the law would otherwise give to the description of the legatee of the personal estate contained in this will. Neither of these facts has any bearing upon its construction.

In every bequest of personal estate to the testator's "heir," the word heir is *necessarily* a mere term of description. Whatever may be the *kind* of heir described, whether heir general, or heir of particular lands, the legatee cannot take *personalty* as heir, for "a man by the common law cannot be heir to goods or chattels, for *hæres dicitur ab hæreditate.*"

The question then arises, whether, when a legatee of personal estate is described in the will by terms which point either to the heir general, or to the heir of particular lands, as the case may be, it is of *the essence of such description* that the party referred to should *actually inherit* from the ancestor that real estate, his capacity for inheriting which, in ordinary parlance, constitutes him its heir? Now it is not

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true, either in legal or popular parlance, that there can be no heir when there is nothing to be inherited. A man's children and other kindred may be described or designated as heirs, whether they take anything from their ancestor or not. The *principle* upon which this rests is, that where the term heir is used to describe a legatee of personalty, the description is by reference, expressed or implied, to *the course of descent*, of some real estate, and not to its *actual* descent. Actual descent of the real estate so referred to, is not a condition implied in such description. The description is just as certain, and identifies the party referred to just as well, whether there is an actual descent or not.

Now if this be true where the terms of the description point to the heir general, upon what principle is it, that it is not true where the description points to the heir of particular lands?

The descriptions in both cases rest upon the same foundation. They in both cases refer to the *course* of a descent, not to an actual descent. In both cases the description remains the same, whether an actual descent takes place or not. If a testator should devise purchased lands and his personal estate to his heir, and before the date of the will, should have been, or afterwards should be, divested by legal process both of the title and the possession of those lands, the heir of those lands would still take the personal estate, because he still answered the description. He is still the party referred to, although he has not actually inherited, either as regards possession or valid title, the real estate of which, had the testator died seised, he would have been the actual heir. So, if instead of being purchased lands,

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they had been derived by descent *ex parte materna*. The description points as certainly to the maternal heir in the one case, as to the heir general in the other. It is clear, therefore, that *the law* does not make the actual descent of the real estate which the testator has devised to his heir, a *condition precedent*, which must happen in order to enable such heir to take personal estate bequeathed to him by the description of heir of the real estate devised.

It is admitted, however, that the *testator* may, if he chooses, make such actual descent of the essence of the description of the heir to whom he refers, and it now remains to consider whether he has done so in this case. And first it is to be observed, that if he has done so, *then no one can under this will take the personal estate in controversy*, because the actual descent has not occurred. The testator has, in such event, described a kind of heir who never had any existence, and who never could have any existence, unless the testator died seised of the land devised. It is next to be remarked, that the description in this will, is given with express reference to the course of descent of an estate of which the testator *was then disseised*. When, therefore, the testator directs that the course of descent of his estate, of which he is then disseised, shall designate his heir, is it not a most strained inference to presume that he intends that description shall be operative *only in the event of his dying seised* of that estate? His description had a meaning when it was given. That meaning was intended to have an operation the moment after the will was executed, if the testator had died at such moment; yet by the construction contended for, the testator is declared to have expressed a meaning

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which he knew was *utterly insensible at the time he stated it*—to have given a description of a legatee which he knew could have no operation if he died the next day, and which, although he retained it to the day of his death, he must all the while have known to be still inoperative?

To avoid the conclusions which thus result, the line of argument will have to be changed, and the position taken that this description must be construed as having been at the outset *contingent*. That it was intended to apply to the heir of the land devised, *provided* the testator recovered and died seised of that land, or at least, maintained a good title to it; but that *otherwise*, it was intended to apply to the heir general. This proposition is not only unsupported by anything appearing on the face of the will, but is essentially opposed to the whole frame of it. Nothing can be more absolute and unconditional than the terms the testator has used. "*My* estate real and personal to *my* heir," twice repeated. The very basis of the whole devise, is an unqualified assertion of ownership of the real estate referred to. This assertion is made with full knowledge of the fact that that estate has been for ten years seized and confiscated—and it is made in distinct and utter disregard of that fact. The estate, he asserts, is still *his*. He will *make it his* for the purposes of his will. It is *his* estate, and all contingencies aside, it *shall* go to his heir—and not only so, but *that* heir shall have his personal estate. If the testator had been seised of the estate at the date of the will, and was afterwards disseised, there would have been even more foundation for the idea that the description was contingent, on the event of his dying so seised,

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than there is now. The very fact of his devising as he has done, the estate which had been torn away from him, *is the the fact of all others which shows the strength of his intention* to make his assertion of his ownership to that estate, for all the purposes of his will, and free from all contingencies, *equivalent to actual ownership.*

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It is wholly immaterial therefore, what was the condition of the title of the testator, to the real estate devised, either at the date of the will, or at his death. All, perhaps, that is necessary to be known upon that subject is, that *he never aliened it.* He continued pertinaciously to claim it till the day of his death, and entertained the hope that his heirs, if not himself would some day regain it. But if it were not so the result would be the same. The testator's description remains unchanged: the law repeats it for him *in articulo mortis:* and its effect, at his death, in identifying the heir of *his* land, is precisely that which it was originally framed to accomplish.

Finally: The situation of the testator before, at, and after the date of the will, with reference to the real estate devised, shows that his *actual intention* in this will was to make the party who at his death would be the heir of his paternal real estate, the legatee of his personal estate.

The evidence upon the question of domicil given in the case of *White* v. *Brown,** exhibits the whole story of the testator's life, as told by himself, with a minuteness of detail seldom met with. In his estimation the greatest event of his life was the wrong he had suffered by the confiscation of his real estate. He always entertained the most firm conviction of

* 1 Wallace, Jr. 217.

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the absolute illegality as well as gross injustice of that confiscation; and he appears to have been impressed with the idea that the heir of that estate had rights to that real estate which he "*could not lose.*"

Under such circumstances this will was made; and it is probably to some such notion as to the superior right, or chance of success, that the heir of his real estate might have to its recovery, coupled with his own determination to leave no means in his power unused, to enable that heir to enforce his rights to that estate, that the present will owes its existence. It is clear from the whole frame of it, that the testator personally cared not who was to enjoy his large personal estate; otherwise he never would have designated his legatee by a description which, *under every possible construction of it*, left the particular *individuals* who were to take under it, of necessity a matter of uncertainty until the day of his death. He cared not even as to the class of persons to which that description would apply at his death; for that class was changed by the Intestate Act of 1794, and yet he made no change in his will in consequence of it. What he *did* care for was, that the party who would be the lawful heir of *his* real estate—that confiscated estate which was still *his*—should have the means to enforce those rights to it which as heir "he could not lose"—that such heir after the testator's death should be enabled to carry out the one absorbing idea of the testator's life. This was his intention at the date of the will; and as the foundation of it—the sense of the injustice he had suffered by the confiscation—became stronger by lapse of time—there is every reason to believe that such intention remained in full force at his

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death. There is every probability, therefore, that from first to last the testator *actually intended* to describe the kind of heir which the law says he has described; that his *intention* and his *words* both point in the same direction. Both are satisfied by the construction which gives his personal estate to the heir of *his* land—both are violated by that which gives it to a party *who is not, and never could be, such heir.*

In reply.

Reply by the half blood.

1st Question. Repeal of the 11th § of Act of 1794.

In reply. I. *The repeal of the* 11*th section of the act of* 1794. There is nothing in the section of the new act contrary, either in terms or in spirit, to what is provided in the omitted clause of the old act. The new act declares itself to be *supplemental* to the old act, and remedial of *defects* in it; and where it means to repeal a section, it repeals it expressly. In the well-argued and well-considered Pennsylvania case of *Bevan* v. *Taylor*,* the Court held the two acts as forming "a scheme of descents" in Pennsylvania; and a declaration in the 7th section and the 11th section of the last act, I incorporate, said the judge who gave the opinion of the Court, into the whole system; for different statutes made at different times, are to be explanatory of and construed into each other; as in the construction of the statute of distributions 22 & 23 Car. II. ch. 14; and statute 1 Jac. II. c. 16.

* 7 Sergeant & Rawle, 493.

2nd Question. Meaning in Pennsylvania of "heir at law."

II. Supposing the 11th section unrepealed, *What is meant in the will by "heir-at-law?" It means heir by statute law.* The question of domicil is unimportant, as the testator had the laws of Pennsylvania in view, when using the terms "heir-at-law," and "lawful heir." For the real estate referred to in the will

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—if any is referred to anywhere—is situate in Pennsylvania; since, at and after the date of the will, the testator neither owned nor claimed any other, and always did claim that. By his devise of *that* real estate to his heir-at-law, the testator necessarily referred to the law which, at his death intestate, would regulate the descent of that real estate; and the only law which could so regulate that descent, was the law of Pennsylvania, where the estate was situate. By blending the personal estate with the devise of the real, he designed it also to go to the heir of that real estate; and therefore in the bequest of the personal estate, the testator referred expressly to the law of Pennsylvania, which, at his death intestate, would designate the heir of his real estate, as designating also the legatee of his personal estate.

In this case, therefore, while the testator's domicil, at and after the date of the will, was Pennsylvania, we are yet relieved from the necessity of relying exclusively upon that position, by the facts that the will was made in Pennsylvania,—by a native of Pennsylvania,—devising real estate in Pennsylvania and not elsewhere,—and bequeathing personal estate to the heir of that real estate; that the will was executed so as to pass only real estate in Pennsylvania, with Pennsylvania executors, one of whom was to be the president, at "the time being," of the testator's death, of a bank in Pennsylvania; and that the will, from its date to the testator's death, was deposited in Pennsylvania; all of which circumstances render it manifest that whatever might be the testator's domicil, at or after the date of the will, he yet had in his view, when he made the will, only the laws of Pennsylvania.

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Reply by the half blood.

Meaning in Pennsylvania of "heir-at-law."

The words "heir-at-law," as *used in this will*, are not in Pennsylvania a *technical* expression, meaning "heir at common law." No authority has been cited which in any degree sustains the position that the words in question ever had in Pennsylvania, when used as in this will, the technical signification claimed for them. If there is any word in the language of the law, whose precise meaning should be considered as fixed, it is the term "heir;" and just in proportion to the precision heretofore attached to its signification should be the strength of the authority adduced to show that the signification has changed.

A brief examination of the references cited on the other side, will show that that position cannot be sustained.

The point they have to prove is, that in a naked *devise* to a testator's own "heir-at-law," those words, in Pennsylvania, mean "heir at common law." The proof they adduce is, That from the date of this will, until after the testator's death, the canons of descent, established by the common law of England, were adopted in Pennsylvania, in all cases where they were not abrogated by statute, so that in *such cases* there was an heir, who was "heir at common law." That this heir at common law was *sometimes*, in the language of legislators, judges, and lawyers, termed "heir-at-law, and that, *therefore*, those words when used nakedly in a will, must mean "heir at common law."

1st. Let us examine the language of the legislation cited.

The words of the act of 1705 relied on, are as follows: "But if the intestate leaves a widow and no child, then such widow or relict shall inherit one

moiety or half part of the said lands and tenements, and the other moiety shall descend and come to the intestate's *next heir according to the course of the common law.* But if the intestate leaves no widow nor child living at the time of his death, or if the children all die in their minority, without issue, then the said lands and tenements shall descend and come to the intestate's *heir-at-law, according to the course aforesaid.*"

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It will be perceived that the language of this Act, instead of supporting the position in question, *is directly opposed to it.* Instead of deeming the phrase "heir-at-law" sufficiently precise to designate the heir at common law, the legislature first describe him by the words "*next heir, according to the course of the common law,*" and afterwards when they do use the words "heir-at-law," carefully subjoin the words "*according to the course aforesaid.*"

The words of the supplemental act of 1764, also cited, are as follows: "But where the wife is living, and the whole premises shall be adjudged and ordered to *the heir at law or any other of the children,* the wife of the person so deceased shall not be entitled to the sum at which the purpart or share of her estate, so as aforesaid ordered to *her heir at law or any of the children,* shall be valued, but the same, together with the interest thereof, shall be and remain charged upon the premises, and the interest thereof shall be regularly and annually paid by *the heir at law or such other child* to whom the same shall be adjudged," &c. "And at the decease of the said mother the said principal sum, so as aforesaid valued and adjudged shall be paid by the said *heir at law or other child aforesaid,* to whom the same shall be adjudged," &c.

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In this act, the words "heir-at-law" are throughout used as synonymous with *eldest son*. They do not refer to the heir at common law, taking as such heir, but are loosely and inaccurately used to distinguish the eldest son from his brothers and sisters.*

* 1 Dallas, 265, 353.

If such inaccurate phraseology proved anything in relation to the meaning of the words "heir-at-law," considered as a *technical term*, it would prove that they meant *eldest son*, and nothing else. A nephew of the intestate, although he might he heir at common law, does not come under the description of "heir-at-law," as the words are used in this act. They are, therefore, clearly not synonymous with "heir at common law."

2. The language of judicial opinions is next to be considered.

† 4 Id. 65.

In *Johnson* v. *Haines*,† the question was, whether a particular case of intestacy was a *casus omissus* in the intestate laws of Pennsylvania? The reporter, and Chief Justice M'Kean, when speaking of the plaintiff, use the terms "heir-at-law," and "heir at common law," indiscriminately. It is to be remarked, however, that in every instance where the term "heir-at-law" is used in this case, the *context shows clearly* that the heir at common law is referred to; whence it is evident that the term "heir-at-law" is used merely as an abbreviation of the term "heir at common law," where, from the context, there is no possibility of mistaking the meaning of the term.

‡ 1 Id. 353.

In *Walton* v. *Willis*,‡ Chief Justice M'Kean, when speaking of the intestate acts then in force, says, "The *main intent* of these acts appears to have been, that real estates should be divided among the children, or representatives in the descending line of an

intestate; and not descend to the *heir at common law:*" thus describing such heir in terms which are unmistakeable. So, in an Anonymous case, decided in 1774, reported in 3 Smith's Laws, 160. "Question, whether his *heirs at common law* shall take, or it shall divide among his other brothers and sisters under the supplemental intestate law?"

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Opposed to the casual expressions, loosely used and always in association with such precise language as prevents their misinterpretation, is *Ruston* v. *Ruston*,* an authority in point to show that the term "heir-at-law," has no such technical signification attached to it, as is here contended for. A question in that case was, whether a proviso, in a devise of land (by a will dated in 1784) to the eldest son, directing the payment of a sum of money, was a *condition*. M'Kean, C. J., said, "The defendant could not be considered in this case as *heir-at-law* in Pennsylvania, where, if at that time a person had died intestate, leaving divers children, his real estate would have descended to all his children equally, the eldest son having only a double portion or share, and therefore the devise may even be considered as a condition." Yeates, J., "But it is objected that the proviso in the will does not form such a *condition* as will warrant an entry on its breach, the defendant being the eldest son and *heir at law under* ENGLISH *ideas*." And Smith, J., "When an ancestor leaves more children than one, the term *heir-at-law* conveys no idea with us; they are all his co-heirs. All are equally entitled, if he dies intestate."†

* 2 Yeates, 54.

† See also French v. McIlhenny, 2 Binney, 20; Crosby v. Davis, 4 Pennsylvania Law Journal, 193.

If the term "heir-at-law" had the technical meaning claimed, in 1791, it has it at this day. The Intestate Act of 1833 in no way affects the meaning

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of the words "heir-at-law," as *used in a will*. It merely excludes the heir at common law in cases of *intestacy*, where there are nearer of kin. No one will contend, that if a testator in Pennsylvania were now to devise his real estate to his "next heir according to the course of the common law of England," the devise would fail because of the exclusion of such heir in a case of intestacy by the act of 1833. The devisee would still take, under the description given by reference to an ascertained course of descent; and if the heir at common law, as the party described, would take under such description, so also would he take under any other description which identified him equally well. By the argument submitted on behalf of the Aspdens, in this case, the term "heir-at-law" is such a description. It means "heir at common law," in a will in 1852, just as much as it did in 1791. Yet will any one contend that if a testator in Pennsylvania should, at this day, devise all his estate, real and personal, to his "heir-at-law," and should die leaving many children, the *eldest son* alone would take, to the exclusion of his brothers and sisters? The argument, to be worth anything, must go to that extent. It must go to the extent of saying, that if the testator, Matthias Aspden, had, after the date of this will, married and had numerous children, and had then republished this will, his eldest son alone, as "heir-at-law," that is, it is said, "heir according to the course of the common law," would have taken everything, and his brothers and sisters nothing; and that such a will made at this day, would have a similar operation.

It is said, however, that the words here used must be construed to mean heir at common law, because

"the testator did not intend his estate to be divided: it was to go to *one person*, hence he uses the singular number." To this, the answer is conclusive, that it is perfectly well settled, the term heir is *nomen collectivum*.* In this case, if the party claiming as heir at common law, John Aspden, had died before the testator, leaving daughters only: no one will say that the daughters, however numerous they might be, would not collectively be the heir at common law. Co-parceners are but one heir, "They be but one heir, and yet several persons." Again, no person can take under this will unless he is clothed with the character of heir-at-law; and if he takes in that character, he must take in that quality, as the heir of the testator, by *lawful descent to his real estate*, as the person whom he has designated as the heir to whom his whole estate shall go as one entire fund. The rules of law put it out of the power of a testator to make his own right heir, or his heir-at-law, a word of purchase to break the course of descent; not because he may not do it by words denoting such intention, but because such intention cannot be legally inferred from the mere use of the term. Yet by the doctrine contended for, the heir at common law shall take as a *purchaser*, under the description of "heir-at-law," although he is unable to take by descent. He takes by force of the "technical expression," alleged to designate him; and as "heir-at-law" is to take away the inheritance devised, from the only party who by the law of the land is capable of taking that inheritance *as heir*.

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* Gwynne v. Muddock, 14 Vesey, 488; Mounsey v. Blamire, 4 Russell, 384; George v. Morgan, 4 Harris, 108.

An isolated extract from the opinion of the Court in the Pennsylvania case of *George* v. *Morgan*, has been cited as authority for the general proposition

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that "in Pennsylvania a testator is to be considered as speaking in reference to the common law system of descents." But the extract *in connection with its context*, shows that the expression used has no such unlimited application as appears to be attributed to it. In that case, the testator, in 1744, devised an estate to his son Mordecai, "to hold to him for and during his natural life, and after his decease to the heirs of his body lawfully begotten, *and to their heirs forever, and in default of such issue* then to the heirs of my son Samuel and their heirs forever," and the question was whether Mordecai took an estate tail under the rule in Shelly's case. The passage in the opinion of Bell, J. above referred to, is as follows: "But it is urged upon us that as, in England, an intention to change the line of descent is sufficiently manifested wherever the superadded words import eventual distribution of the estate among several, as if it be limited over as a tenancy in common, or to be divided equally among all the heirs of the first taker,—in Pennsylvania since the abolition of the rights of primogeniture, such a devise as we have here, must be taken as changing the descent; the superadded words and 'to their heirs forever,' necessarily importing not the heir in tail, who is generally the right heir in England, but all the lineal descendants of the præpositus, who take as parceners with us under the general title of heir. I confess, I was much struck with the view when it was first presented, and very much inclined to adopt it as consistent with reason. But further reflection has satisfied us that it is inadmissible. In the first place, it frequently happens that, even in England, the right heirs of a devisor may be of persons entirely

different from him who would alone take as heir in tail, and yet it has always been there held as essential, that to withdraw the devise from the power of the rule, distribution must be expressly contemplated, and shown to be so by some precise direction. Secondly, though in *Findlay* v. *Riddle*,* Yeates, J., seemed much inclined to adopt the idea that, with us, a limitation to heirs general always imports distribution, and is therefore repugnant to the rule in Shelley's case, it was not received in our subsequent cases, though expressly urged upon the attention of the Court, where full scope was afforded for its operation, had it been thought tenable. In the last case of *Heilman* v. *Bouslaugh*, the reasoning of the chief justice is in direct repudiation of it. All this is conclusive that, *in this state, a testator is to be regarded as speaking in reference to the common law system of descent.*"

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* 3 Binney, 139.

Thus far the case has been considered as if it turned solely upon the construction of the term "heir at law." The testator however has in a subsequent clause of the will used the words "lawful heir" in a repetition of the original devise of his estate real and personal.

It cannot be pretended that any one, in this commonwealth, when speaking of his "lawful heir," refers to that person who would inherit according to the law of a distant country; or that, like the phrase "heir-at-law," it has been used in any special, or professionally accurate sense, as an equivalent or abbreviation of the more correct expression, "heir at common law," or "next heir according to the course of the common law."

The exact term 'lawful heir' is used in the statute

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of 1705, to designate that person, or those persons to whom that *statute* gives the estate. Speaking of escheats of real estate in default of any "known kindred," it says: But "if the *lawful heir* to any such lands or tenements shall at any time appear, he shall have them," &c. This clearly means the persons to whom, on the owner's death, that *statute* gives them, and it entirely changed the common law canon of descent.* In 1st New Jersey Reports† it is said that "the word lawful heir must be understood to mean an heir capable of inheriting the lands in question under the laws of New Jersey." In a Pennsylvania case,‡ a brother of the half blood is called 'heir.'

* 3 Smith's Laws, p. 158, § 13th of the Act of 1705.

† State v. Engle, 347, 361, 367.

‡ Simpson v. Hall, 4 Sergeant & Rawle, 337; and see Hart v. Gregg, 10 Watts, 190.

3rd Question. At what date does the will speak?

III. The terms "heir-at-law," and "lawful heir," as used in this will, designate the person or persons on whom the law of Pennsylvania *at the testator's death*, would cast the inheritance of the real estate referred to in the will, as his lawful heir, provided he had died intestate. The general rule, that in a devise to the testator's *own heir*, the term heir must be construed to apply to the person or persons answering the description at the testator's death, is unquestioned. In such a case the maxim "nemo est hæres viventis," emphatically applies.§

§ 2 Jarman on Wills, 28.

That the view of the testator was prospective in fact, is evident, for he declares that his estate shall go to the party who *would be* his lawful heir in case there might be no *doubt* of his own legitimacy. *That doubt could only arise after his death.* As matter of law also, as well as of actual intention, *the law of descent* which is to designate the heir referred to in this will, is the law in force at *the testator's death*, and not in force at the date of the will. From

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the very nature of a devise to a testator's own heir, it is plain that every such testator must contemplate two classes of contingencies.

1. The person or persons answering the description may change, by births or deaths, from hour to hour.

2. The laws regulating the course of descent, like all other laws, are liable to change.

In regard to the first class of contingencies, it is not pretended that it is not, as matter of law, within the purview of such a testator. In this very case, the party who was the heir at common law, at *the date of the will*, died before the testator; yet no one doubts that the present claimant, the son of that party, at the date of the *testator's death*, answered the description of the testator's heir at common law, although he did not do so at the date of the will.

So also, as to changes in the law of descent. A testator when devising to his own heir, *ex vi termini*, refers to the period of his own death, as that whereat his heir is to be ascertained. He has such period in his actual, as well as legal, contemplation, when making such devise: and as it is then, and then only, that his heir can be ascertained,—and such heir can only be ascertained by the law *then in force*—it follows that that law, whatever it may be, is the rule which the testator declares it his intention to adopt as part of his will.

This doctrine in no degree conflicts with the general proposition that "the intent of the testator ought always to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents which the testator could not then foresee;" for in the case of a devise to his own

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heir, his intention at the date of the will is prospective in its character; it actually looks at the period of his death, as that before which the law cannot operate to define his heir. It does not follow therefore, that because the law of descent changes after the date of the will, in which a testator has devised to his heir, we are to impute an actual *change of intention* to the testator, and presume that he *actually adopts* the law as changed. He has relieved us from the necessity of speculating upon such a question, by declaring in advance, that the law in force at his death, is that which is to define his heir. The changes in the law of descent, after the date of such a will, however frequent and however great, affect in no degree his legal intention. Whenever he dies, his *heir* will still take. The law throughout all its changes, will still carry out his intention, and give the estate to his heir.

All the cases cited on the other side, therefore, to the effect that after-purchased lands would not pass at the date of this will, and that devises to classes of individuals *in existence at the date of a will*, cannot be construed to apply to individuals of the class referred to, who came into existence after the date of the will,—have no application in a case where the devise is in its nature prospective, and looks to the period of the testator's death. *Martindale* v. *Warner*,* cited as "authoritatively settling" the point now in question, it is submitted, has no bearing on it whatever. In that case a testator, in 1828, bequeathed certain legacies to several of his brothers, nephews and nieces, naming each of them, and died in 1849. Several of the legatees died before the testator—some before, and others after the passage of

* 15 Pennsylvania State Reports, 479.

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an Act of May 6, 1844, hereafter mentioned—leaving issue; and the question was whether the legacies to those persons *lapsed*, or whether the issue of such legatees were entitled thereto, under the provisions of the act referred to. The words of the act are as follows:—"No devise or legacy, *hereafter made*, in favour of a brother or sister, or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants, shall be deemed or held to lapse or become void, by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favour of such surviving issue, with like effect, as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise." It was held that this act did not operate upon the will in question, because it was obvious by the words "devise or legacy *hereafter* made," that no retrospective effect was intended to be given to it, and that, such being the case, "that the testator permitted his will to stand without alteration for several years, or that he may have known of the Act of 1844 is nothing."

IV. The expression *first* paying, and the provision for the half blood, is too feeble to control any but an ambiguous expression. We have shown that the term heir-at-law, explained by the term 'lawful heir,' points plainly and fixedly to certain persons who are constantly changing, who are left perfectly uncertain till the testator's death; and are then determined easily, clearly, and unchangeably. The fact that in the course and changes of thirty or forty years these

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persons happen to fall within some other provision of the testator's bounty, is not enough to unsettle the legal definition of the clearest and best defined term of the law.

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5th Question. Admission of extrinsic testimony to explain the will.

V. *Extrinsic evidence is inadmissible to show that the testator used the words "heir-at-law," or "lawful heir," in a peculiar sense of his own, differing from their legal signification.*

The law upon this subject is embodied by Mr. Wigram,* in a general proposition laid down by him. "When there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense, be tendered."†

* On Wills, p. 17.

† Delmare v. Robello, 1 Vesey, Jun., 412; Hampshire v. Peirce, 2 Vesey, Sen., 216.

In *Mounsey* v. *Blamire*,‡ the testatrix gave the sum of £4000 "to her heir." Evidence was tendered to prove that the person intended by the testatrix was an individual (a stranger) whom she had promised to make her heir, and whom she used to call her heir. The heir at law claimed the legacy. The Master of the Rolls decreed the legacy to the heir-at-law.

‡ 4 Russell, 384.

To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

VI. *Argument for the maternal half blood.* Supposing all the foregoing arguments to be insufficient, then the case of the heir at common law is disposed of against him. And the new question arises; the

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one between the half blood itself. To which side of the half blood, or how amongst them does the estate go? Does it go to the paternal side alone, or to the maternal in connexion with it? We contend that it goes to both.

Argument of the maternal half blood.

To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

1. This will, in fact and in law, is a will of *personal* estate alone, and not of real estate, because the testator had no real estate to devise at the time of making his will, nor had he any at any period afterwards, up to the day of his death. The case resembles those cases in which it has been held that a will of real and personal estate is revoked *pro tanto*, as to real estate, by its alienation subsequently to the date of the will; and becomes a will of personalty alone. Thus in a Massachusetts case,* the language was, "all the residue of my estate, *real* and personal." But the testator afterwards aliened the only real estate he had at the time of making the will: and this, on a question of probate, was held to be a revocation *pro tanto*, and that the will became a will of personal estate simply. Evidence extrinsic to the will was held necessarily admissible to show the alienation of the real estate whereby the will had become a will of personal estate only. After speaking of the object of the law in excluding parol testimony generally, as being to prevent the intention of the testator being defeated, Shaw, C. J., says, what is certainly true as a fact, and will explain the testator Aspden's devise of real estate, he having no estate of that sort: "*It is usual, in wills as well as in other instruments, to use broad and general language large enough to embrace every species of property, although there are but few species of property in the mind of the testator or in his power* to bequeath, upon the

* Brown v. Thorndike, 15 Pickering, 388, A. D. 1834.

"Heirs," in reference to personalty, means next of kin.

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safe maxim that *omne majus continet in se minus;* as "all my estate of every name and nature;" "all my property wherever, &c."* Now, the will being one of personalty merely, the term 'heir' is to be considered in reference to its subject-matter, and means *next of kin;* who are in this case, it may be observed, the same person as the heirs general. In *Holloway* v. *Holloway*,† where there was a bequest of money to "heirs-at-law," these heirs, at the testator's death, being there also, as in this case, *the next of kin*, the Master of the Rolls, Sir R. P. Arden, says: "This is personal property; and it is said that though 'heirs, &c.,' have a definite sense as to real estate, yet *as to personal estate it must mean such person as the law points out to succeed to personal property.* I am much inclined to think so. If personal property were given to a man and his heirs, it would go to his executors. I rather think if I was under the necessity of deciding this point, I must hold it heirs *quoad* the property; that is, next of kin. . . . . Great difficulties would arise from the construction that heirs-at-law are intended, and applying it to personal property. He might have different heirs-at-law; heirs descending from himself as first purchaser; heirs *ex parte paternâ* and *ex parte maternâ*. I am inclined to think the Court would in such a case consider him as the first purchaser, so as to take in both lines. However, there is no occasion to say anything upon that." This view is supported by other cases.‡

Argument of the paternal half blood.

To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

"Heirs," in reference to personal property, means next of kin.

* And see Very v. Very, 3 Pickering, 374; and Hilliard v. Binford, 10 Alabama, 977.

† 5 Vesey, 403.

‡ Vaux v. Henderson, 1 Jacob & Walker, 388; Gittings v. McDermott, 2 Mylne & Keen, 69; Evans v. Salt, 6 Beavan, 266; Eddings v. Long, 10 Alabama, 203.

2. But if this be not so, still real estate which did not belong to the testator at all—estate which was not *his*—cannot direct the course of this personalty. The words are "MY real estate." Now that alone is

'mine' which is not owned by any body else. What I claim, is not necessarily mine; nor even what I believe to be mine. The argument of the Harrison counsel recalls Lord Harwicke's language, when speaking in parliament upon the bill to indemnify witnesses who should give evidence against Sir Robert Walpole, and offering a reward for evidence without assertion of any *corpus delicti*. 'But, says a noble lord,' replies Lord Hardwicke, sarcastically, 'if we have not here a *corpus delicti*, we have what is sufficient for the purpose, a CORPUS SUSPICIONIS; a new expression and a new invention, the *body of a shadow*, and on this foundation he calls upon you to build his new superstructure of injustice.'* The Harrison counsel seek to change a natural and primary construction of the will, not by showing any real estate which either did or might, could, would, should, or ought to pass by the will, but by showing his unfounded and absurd belief—his delusion—that he owned, or ought to own, some such estate. Such a belief or delusion has never been regarded as real estate, except that kind known as *chateaux en Espagne*, by any court anywhere. "In expounding a will," says Mr. Wigram,† "the Court is to ascertain not what the testator actually intended as contradistinguished from what his words mean, but what is the meaning of the words he used. And certainly in a will so simple as this, calling for no forced construction, 'my' can never be converted into 'his.'

3. All this belief, too, is sought to be proved by the testator's declarations extrinsic to the will. No doubt you may and must resort to extrinsic evidence to show whether or not the testator had or had not real estate. But, then, this is simply a fact, and

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Argument of the maternal half blood.

To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

"My" estate, means mine in fact, and not mine in belief or claim.

* Campbell's Lives of the Lord Chancellors, p. 94.

† Wigram on Wills, 8.

Testator's declarations admissible to show his ownership.

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To which side or sides of the half blood does the estate go? To the paternal alone? or to both?

this case states that it is shown by such evidence that he owned no such estate. The Harrison counsel now attempt to contradict this fact, and to prove this imaginary subject-matter by the testator's ridiculous *declarations*. This cannot be done. The declarations of a testator prior to or cotemporaneous with, or subsequent to the making of his will, are inadmissible, and cannot be received to prove his intention; not even the instructions given for the will.* Nor even an express declaration made at the time, of what his intention was;† and this although no doubt may exist in the mind of the Court that such was the actual intention of the testator. To the same purport are our American authorities. "The legal construction of a will in writing," say the Court, in *Comfort* v. *Mather*,‡ "cannot be *explained* or *altered* by the parol declarations of the testator, of his understanding of the meaning of the will, or of his intentions to do something else. So in *Lewis* v. *Lewis*,§ "where parol declarations made by the testator as to his intention of dying intestate, whether *before* or *after* the making of the will, are not admissible to show a revocation of it." The only exception to this is of declarations of the testator to prove a *material* fact collateral to the question of intention, where such fact would go in aid of the interpretation of the testator's words. These cases, however, will be found to be those only in which the description in the will is *unambiguous* to any one of several subjects.||

* 1 Jarman on Wills, 353.

† Wigram on Wills, pl. 104.

‡ 2 Watts & Sergeant, 453.

§ 2 Watts & Sergeant, 455; and see Asay v. Hoover, 5 Pennsylvania State Reports, 21; Trustees v. Sturgeon, 9 id. 321; Farrar v. Ayres, 5 Pickering, 404; Brown v. Saltonstall, 3 Metcalf, 423.

|| See cases cited 1 Greenleaf on Evidence, pp. 373, 4, 5, 6; 1 Spence Equitable Jurisdiction, 560; Wigram on Wills, pl. 104, p. 81, and pl. 194, 5.

The Court's Opinion.

Grier, J. This case has been learnedly, laboriously and on some points very ably argued, and we congratulate the parties and the counsel that, after

twenty-two years of litigation, there is now a prospect that, in three or four years at farthest, those who are entitled to the large estate in suit, will be permitted to enjoy it, and that those who are not, will cease to indulge vain hopes respecting it.

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The first question for our decision, is *whether the 11th section of the act of* 1794 *has been repealed by the 7th section of the act of 4th April*, 1797. If so, then all other parts are unimportant.

Consideration of the 1st Question.

Repeal of the 11th § of the Act of 1794.

Let us inquire what are the principles laid down by the sages of the law to govern questions like the present.

1st. "An act of parliament may be repealed by the express words of a subsequent statute, or by implication."

2nd. "If a subsequent statute contrary to a former have negative words, it shall be a repeal of the former act."

3rd. "Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; for '*leges posteriores priores contrarias abrogant.*'"

4th. "A later act has never been construed to repeal a former act, unless there be a contrariety or repugnance in them, or at least some notice taken of the former act, so as to indicate an intention in the law-giver to repeal it." The law does not favour a repeal by implication unless the repugnance is quite plain.* Also, when two acts are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication.†

* Dore v. Grey, 2 Term, 365.

† 11 Reports, 63.

To come to the case before us. The act of 4th

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April, 1797, was made, says Chief Justice Tilghman,* for the express purpose of *supplying the defects* of the act of 19th April, 1794. The latter act purports to be a supplement to the former. The 5th section, where the cases omitted in the former act, and intended to be supplied, are commenced, has this preamble: "Whereas the provisions of the act to which this is a *supplement*, appear to be *incomplete*," &c., and proceeds in that and the following sections, to supply certain *casus omissos* of the act of 1794, and ends the last section in these words: "and that the second section of the act to which this is supplementary, be, and the *same is hereby repealed*." Now the legislature have declared, in express terms, that they repeal the 2nd section of the act of 1794 only. There is, therefore, no express repeal of the 11th section. There is no provision in the latter law, which negatives any provision of the 11th section of the former. The issue of the half-blood shall inherit, says the former, in preference to more remote kindred of the whole blood, and there is not a syllable in the last act, which is contrary to this provision of the first. There is no repugnancy between them. The latter was made to supply omissions of the former, and yet, without directly repealing the 11th section, it is contended that the 7th section of the latter act creates a *casus omissos* by implication, because it omitted to re-enact what already had been provided for in the 11th section of the first act.

* Cresoe v. Laidley, 2 Binney, 286.

In the case of *Bevan* v. *Taylor*,† cited at the bar, the Supreme Court of Pennsylvania declared that the act of 1794, and its supplement of 1797, should be construed as one act. The 11th section of the

† 7 Sergeant & Rawle, 403.

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Resolution of the 1st Question.

This 11th § not repealed.

the former applies only to the inheritance of real property, and the 12th section, which appears to include both real and personal, provides for the issue of brothers and sisters of whole and half-blood only by implication, or negative pregnant, and wholly omits the case where there are both. The 7th section supplies this oversight or omission; first, in case there are brothers and sisters, or their representatives, both of the whole and half-blood; and, secondly, provides for the distribution of the personalty when there were no brothers or sisters of the whole blood, but brothers and sisters of the half-blood; but, in supplying this omission, it unnecessarily included the inheritance of the realty, which had already been provided for in the 11th section of the original act; and, moreover, neglected to include the issue of the half-blood, which still remained a *casus omissus* as regards the personalty, by the omission of the words or "their lawful issue," in the supplement.

Construing this act of 1794, with its supplement of 1797, as one act, we have, then, this case: a latter section unnecessarily repeats some of the provisions of the former section, and omits others. This omission does not, I think, amount to a repeal of what is not repeated.

Consideration of the 2nd Question. Meaning in Pennsylvania of "heir at law."

II. *As to the meaning of the term, in Pennsylvania, 'heir-at-law.'* The language of some of our statutes, as well as that of eminent lawyers belonging to the bar and bench, do seem undoubtedly to favour the argument of John Aspden's counsel; that the term has been generally used in Pennsylvania, to designate the heir at common law.

Let us however look at this matter further. By the charter granted to Mr. Penn, the laws of Eng-

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land "for regulating and governing of property, as well as for the enjoyment of lands and succession of goods and chattels," were introduced and established in Pennsylvania, to continue till they were altered by the legislature of the province. But the canons of descent of the common law were soon changed; and as early as 1683 it was enacted "that the estate of an intestate shall go to his wife and child or children, and if he leave no wife, child, or children, it shall go to his brothers and sisters, if any there be," &c., &c. Afterwards the act of 1705 gave the eldest son a double share. But, without attempting to give a history of the legislation on this subject, it may suffice for the present to say that, although the policy of her legislation was to distribute the estate of an intestate equally amongst the next of kin, no attempt was made to provide a complete canon of descents and distribution till 1794. This act was soon found to have many omissions, and was further amended by a supplement in 1797. In the meanwhile the courts construed these acts strictly, giving the inheritance to the heir at common law in all cases where a contrary direction was not given to it by the plain words of the statute.* The common law of England, as governing cases not specially provided for by statute, was never totally abolished till the revised code of 1833 was adopted. Hence, the language and phraseology of the English courts continued to be used in the courts of Pennsylvania, sometimes, perhaps, without regard to proper distinction or absolute correctness of diction; and here, as there, the term "heir-at-law" was not unfrequently used as an abbreviation, substitute, or equivalent for the expression "heir at common law."

* Johnson v. Haines, 4 Dallas, 64; Cresoe v. Laidley, 2 Binney, 279; Jenks v. Backhouse, 1 Binney, 91.

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In section 8, of the act "For the Better Settling of Intestate's Estates," passed in 1705,* the heir at common law is described with accuracy as "the next heir according to the course of the common law." But in the supplement to that act, passed in 1764,† and in section 4 of the principal act, the phrase "heir-at-law" is somewhat inaccurately used to distinguish the elder son from his brothers and sisters. In *Johnson* v. *Haines*,‡ Chief Justice M'Kean uses the expressions "heir-at-law" and "heir at common law" indiscriminately to designate the same person. In the cases of *Jenks's Lessee* v. *Backhouse*,§ and *Creswe* v. *Laidley*,‖ reported in the volumes of Mr. Binney, while the very learned and accurate reporter, in his syllabus, carefully uses the phrase "heir at common law" only, the counsel, of whom the reporter was one, and sometimes the Court, have used the shorter expression "heir-at-law" as synonymous.

* 3 Smith's Laws, 156.

† Id. 160.

‡ 4 Dallas, 65.

§ 1 Binney, 91.

‖ 2 id. 279.

Without venturing to assert that these and other instances to be found in our reports are evidences of careless diction, or of an inaccurate application of the language of English lawyers to the peculiar legislation of Pennsylvania, I may say, it is an *usus loquendi* peculiar to a class; it has not the force of authoritative definition, or of judicial decision, where the question is directly brought before the Court. On the other hand, we have a case more like an adjudication of the point. In *Ruston* v. *Ruston*,¶ the question was made whether a proviso in a devise of land (by will, dated in 1784) to the eldest son, directing the payment of a sum of money, was a condition. It was argued that it could not be so, for the "heir-at-law" only can enter for the condition broken, which heir the defendant himself was. To this it was an-

¶ 2 Yeates, 61.

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swered, that in Pennsylvania all the children are "heirs-at-law," or the "heir-at-law" of the father; and with this Chief Justice M'Kean, who delivered the opinion of the Court, agreed, and said, "the defendant could not be considered, in this case, as heir-at-law in Pennsylvania, where, if, at that time, a person had died intestate, his real estate would have descended to all his children equally, the eldest son having only a double portion or share, and therefore the devise may even be considered as a condition."

* French v. McIlhenney, 2 Binney, 20.

In this same view, in another case,* when the two expressions come to be considered together, and therefore to be considered accurately, Chief Justice Tilghman observes, "In England the eldest son is heir; but here the law is more equitable, and *the children together are considered as heirs.*"

The persons on whom the law of Pennsylvania casts the estate of an intestate, if more than one, hold as tenants in common, or as co-parceners do in England, and in correct legal phraseology may be styled the 'lawful heir,' or the 'heir-at-law.'

But admitting that if this will had used the words "heir-at-law" alone as descriptive of the person to whom the whole estate is bequeathed, there might have been sufficient reason to doubt whether the testator had not intended thereby to describe the "heir at common law" in contradistinction to the heir-at-law by the statutes of Pennsylvania; we are, nevertheless, relieved from this uncertainty by the second description of the devisee in the will, intended to be explanatory of the first. The testator explains his meaning, by saying he intended to describe the party who would be his "lawful heir," in case he himself were legitimate. Now, it cannot be pretended that

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any one, either lawyer or layman, in Pennsylvania, when speaking of his "lawful heir," refers to the person who would inherit according to the law of England; or that, like the phrase "heir-at-law," it has been used in any special, peculiar, or professionally technical sense, as an equivalent or abbreviation of the more correct expression "heir at common law," or "next heir according to the course of the common law." The statute of 1705 expressly used it in the sense of any person to whom the statute itself gives the estate.

The expression "lawful heir," as explaining the expression "heir-at-law."

How can the Court be justified in construing the expression "heir-at-law" in its peculiar professional sense, according to the *modus loquendi* of a certain class, and not according to its legal and established definition, as the person or persons on whom the law casts the inheritance, when the testator himself has used another expression, as an equivalent or explanatory of the first, which never was used in that peculiar sense which has been carelessly given to the other, but agrees with it in its legal and established definition?

Resolution of the 2nd Question. "Heir-at-law," as explained by "lawful heir," means the person or persons on whom the law of Pennsylvania casts the descent.

Nor is this argument subject to the retort which the lord chancellor said the counsel might have on each other, in *Lowndes* v. *Stone*,* where A. devised his "estate to his next of kin or heir-at-law." "You have a fair retort," says he, "on each other; one side may contend that 'next of kin' means 'heir-at-law;' the other that 'heir-at-law' means 'next of kin.'" In that case the testator had ignorantly used terms as equivalent or synonymous which are incapable of the same definition. Here the term used as explanatory is capable of the same definition, and relieves the doubt as to whether the first was intended

* 4 Vesey, 649.

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to be used in a special sense, not necessarily included in its general definition.

Resolution of the 3rd Question. The will speaks from the testator's death.

III. *From what date is the will supposed to speak?* The strict and legal meaning which the Court assign above to the term "heir-at-law," and the decision hereafter given on this account on the admission of parol evidence, will render obvious the reasons of our decision on this point, argued by the counsel of the heir at common law, with so much learning. The maxim "*Nemo est hæres viventis*," applies; and it follows, that where a testator describes his intended devisee or legatee as the person on whom the law, at his death, would cast the inheritance of his estate, his will must, *ex vi termini*, be construed as speaking at the death of the testator, and not at the time of its execution.* It will also dispose of the argument raised by the same counsel,—

* 1 Jarman on Wills, 287.

Resolution of the 4th Question. "First paying," and a provision do not control the force of "heir at law."

IV. *That the expression "first paying" controls the otherwise settled meaning of the term "heir-at-law."* It does not follow, the Court is of opinion, because the testator gives some legacies to certain of his half-blood relations, that he intended to exclude them if one or more of them answers at the same time this clear, exact, settled, and legal designation of his will. Let us to proceed to consider a remaining considerable point, illustrative of the reasons of our decision on these two last.

Consideration of the 5th Question. Admission of extrinsic testimony to explain the will.

V. *The admission of extrinsic evidence to show in what sense the testator used the phrase "heir-at-law."* The difficulty presented in this will is not one arising upon a latent ambiguity, as where a testator bequeaths his estate to his nephew, John Smith, and has two or more nephews of that name. On the contrary the testator has described a certain

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person, or a certain class of persons, as the objects of his bounty: the description given cannot equally apply to two or more. If the testator declares that the *hæres factus* of his will shall be the same as the law would designate as his *hæres natus*, if he had died intestate, there can be no ambiguity to be explained by parol testimony. If A. B. be the person described by the will, it would be a perversion of law to suffer parol testimony to be admitted, to prove that the testator meant C. D. The statute of frauds and perjuries would be annulled. Much of the extrinsic evidence, therefore, which by consent of the Court, was conditionally taken and drawn into the discussion of this case, will have to be rejected. Conversations, related after the lapse of half a century, are seldom worthy of credit; and, even if believed, are no evidence of a testator's true intention. The declarations of a rich uncle to his numerous poor relations, may often be considered as made rather to conceal than to exhibit his real intentions. Again, suppose a testator should devise his property to such of his cousins as should be tenants of the manor of Dale, at the time of his death; and that, at the time the will was made, his cousin A. was tenant, but at the time of his death his cousin B. answered the description in the will; would the Court admit evidence to show that the testator always lived, and had died under the impression that A. would be the person that would take under this devise? The will having declared the clear, paramount, and ruling intention of the testator, that a person should take, who, at the time of his death, should answer to a certain description; the fact that the testator never knew, or always laboured under

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a mistake, as to the person who would probably answer to that description, at the time of his death, would not affect the construction of his will.

Consideration of the 5th question.

Admission of extrinsic testimony to explain the will.

Now the meaning of the term "heir-at-law," I consider to be settled, and that there is nothing within the four corners of this will which explains or controls that meaning, or shows any intention of the testator to use the word in any other than its technical legal import, to wit, "as the person or persons on whom the law would cast the inheritance of his real estate at his death."

I consider the established principles of law, which bear upon the question, being the result of all the cases, to be clearly and correctly stated in the valuable treatise on wills, by Mr. Jarman.*

* 2 Jarman on Wills, ch. 28.

1st. Like all other legal terms, the word "heir," when unexplained and uncontrolled by the context, must be interpreted according to its strict legal import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy.

2nd. It is clear, therefore, that where a testator devises real estate simply to his heir, or to his heir-at-law, or his right heirs, the devise will apply to the person or persons answering this description at the time of his death.

3rd. The circumstance, that the expression is "heir" (in the singular,) and that the heirship resides in, and is divided among several individuals as co-heirs, would create no difficulty in the application of this rule of construction; the word "heir" being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description.

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Admission of extrinsic testimony to explain the will.

4th. It is true, that with respect to personalty, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the next of kin, or the person or persons appointed by law to succeed to property of this description. Where the gift to the heirs is by way of substitution, this latter construction has sometimes prevailed, an example of which occurs in the case of *Vaux* v. *Henderson*,* where a testator bequeathed to A. £200, "and failing him, by decease before me, to his heirs," and the legacy was held to belong to the next of kin of A., living at the death of the testator. Sir R. P. Arden, M. R., in *Holloway* v. *Holloway*,† was strongly disposed to give the same construction to the word "heirs" applied to personalty, though his opinion, on another question, rendered the point immaterial.

* 1 Jacob & Walker, 388, n.

† 5 Vesey, Jr., 399.

5th. But cases of this description must not be understood to warrant the general position that the word "heirs," in relation to the personal estate, imports next of kin, especially if real estate be combined with personalty in the gift; which circumstance, according to the principle laid down by Lord Eldon, in *Wright* v. *Atkyns*,‡ affords a ground for giving to the word, in reference to both species of property, the construction which it would receive as to the real estate, if that were the sole object of disposition. Thus, in the case of *Gwynne* v. *Muddock*,§ where a testator gave all his real and personal estate to A. for life; adding, after her death, "her nearest heir-at-law to enjoy the same," Sir William Grant, M. R., held that the heir-at-law took both the real and personal estate, not the realty only, the testator having blended them in the gift.

‡ 19 id. 299.

§ 14 id. 488.

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Resolution of the 5th Question.

Extrinsic testimony not admissible to explain the will.

6. And even where the entire subject of the gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense, nor will the construction be varied by the circumstance that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir. Thus, under the words "to my heir £4,000," three co-heiresses of the testator were held to be entitled; Sir J. Leach, M. R., observing, "where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word heir."*

* Mounsey v. Blamire, 4 Russel, 384.

Now, we have not here a legacy of money to "heirs" by way of succession; nor is there a syllable in the will indicating that the testator had any peculiar meaning of his own attached to the words "heir-at-law," or "lawful heir," or that he used the word "heir" as a synonyme for "relations" or "next of kin." On the contrary, he calls it his "estate," and not only so, but his estate "real and personal," and the person or persons designated to take it, are designated as the "heir-at-law" or "lawful heir."

It is manifest that the testator did not intend that his property should be divided into real and personal after his death, and be given to different persons; *but that the person or persons on whom the law would cast the inheritance of his lands at his death should have his personal property, subject only to the payment of debts and legacies.*

Our decision on these five points disposes of every

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part of the case of John Aspden, the heir at common law. He has no claim to this estate, on any view of the case which we can take.

Statement of the 6th Question. One between the two sides of the half-blood heirs.

But now arises a *new question* between *new* parties. The two parties of the half blood, neither of whom could get anything if the heir at common law was the person designated, and who therefore combined their forces as friends to dispose of *his* claims, now raise a question between themselves which they had reserved as against *him*, and upon which they now dispute separately with one another as strenuously as they before did jointly on the other question with the heir at common law. Assuming rightly that the estate is to go to whomsoever the law would cast the inheritance of the testator's lands; the Harrisons—the heirs *ex parte paternâ*—claim the whole estate. And whether they shall have it all, or whether they must share it with the heirs *ex parte maternâ*, their late co-operators, the Hartleys, against the heir at common law, is this new question.

Recapitulation of the argument of the paternal heirs.

The Court apprehends fully the argument of the Harrison heirs. As being the only heirs *ex parte paternâ*, they contend that they alone fulfil the description of "heir-at-law," or "or lawful heir" of the testator, to the exclusion of the half blood *ex parte maternâ;* that the term heir has reference to an inheritance, and the question as to what person is designated by that term depends on the realty which is to be inherited; that this designation of the testator's intention to give his personalty to his heir, instead of his next of kin, cannot depend on the validity of his title to the estate which the testator expects him to inherit. Thus, in England, if a man dies seised of lands which came to him by descent

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Recapitulation of the argument of the paternal heirs.

from his father, and without children, his cousin of the whole blood of his father will be his heir; but if his estate came to him from his mother, his cousin of the whole blood *ex parte maternâ* would be his heir. That, therefore, the term "heir-at-law," as *designatio personæ*, in a will, has reference, *ex necessitate*, to something *dehors*, or without the will, which must be known in order to ascertain the intention of the testator. That the law of Pennsylvania, while it substitutes nearer kindred of the half blood to more distant kindred of the whole blood, adopts the same principle, viz. that the heir must be of the blood of the first purchaser. That the testator having never owned any property, except that which came to him from his father, and having never voluntarily parted with it, but having tenaciously claimed it all his life (believing his attainder and the forfeiture of his property was not only unjust but illegal), must be supposed to designate and intend by the description "heir-at-law or lawful heir" only such person or persons as would stand in that relation to the property which he expected to descend to his heir. That if it is competent to receive parol testimony as to what estate he died seised of, and how the title to it devolved upon him, it is equally competent to ascertain in this way what property he claimed or supposed would descend to his heir, especially as it appears on the face of the will that he supposed himself seised of some real estate, and his intention must be the same whether he was right or wrong in that claim, belief, or supposition. And consequently, that the testator having never owned or claimed to own any property but that which was devised to him by his father, his nephews and nieces of the maternal half-

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Consideration of the 6th Question.

One between the two sides of the half-blood heirs.

1st. In view of fact that testator had no real estate.

blood would have inherited nothing from him, and the description of heir-at-law or lawful heir could not possibly attach to them.

The Court acknowledges the force of this argument. Let us then consider the question, 1st, on the undisputed fact that the testator was *not* seised of any real estate at the time he made his will, or afterwards; and, 2d, consider whether the unfounded belief that he was the rightful owner of certain property which was devised to him by his father, can be received to vary the result.

1st. It is not true, either in legal or popular parlance, that there can be no heir where there is nothing to be inherited. A man's children and other kindred may be described or designated as heirs, whether they take anything from their ancestor or not. Thus, in *Counden* v. *Clerke*,* it is said: "But this (the words 'right heirs male') hath a divers consideration in case of descent, and in case of purchase. For the word heir is sometimes taken absolutely, and as the the Grecians call it, ἁπλως, or *simpliciter*, sometimes κατα τι, or *secundum quid*, or *per accidens;* sometimes *in abstracto*, standing naked by itself, or of itself; and sometimes *in concreto*, clothed with land or rent, in respect of which he may be heir, as the word is here. For example, the younger son in borough English, is heir, and all the sons in gavelkind; whereof the reason is, because the custom of those lands is, that they must descend to the younger sons, or all the sons; so they are heirs *secundum quid* of those lands, in point of descent, or when they descend, for then they are within the custom that gives the inheritance."

* Hobart, 31, a.

Hence, a bequest of personal estate "to my heir-

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at-law," or "right heir," would not be void for want of some person to take, even though the testator should not die seised of real estate. And whether a bequest by a man seised only of property by inheritance from his mother, to his "right heir," or heir-at-law," would be interpreted as describing his right heir *simpliciter* or *in abstracto*, and not his heir *secundem quid*, or special heir of the particular estate, is possibly an open question. But in a case in 3d Levinz, 406,* an heir *ex parte maternâ* limited (by deed) several estates, with reversion to his "right heirs," and it was decided that the reversion should go to his right heirs *secundum quid*, that is, to his heir *ex parte maternâ*.

* Godbold v. Freestone.

Now, admitting that a devise of Blackacre "to his heir-at-law," or "right heir," by a testator who inherited it from his mother, would be construed as a devise to his heir *ex parte maternâ*, or his heir *quoad hoc*, and that such person would hold by descent, and not by purchase, on the supposition that the testator meant to describe the person who would, at his death, be the lawful heir of the thing devised; and admitting that a bequest by the same person of all his real and personal estate to his heir-at-law would be construed as a designation of the person on whom the law would cast the estate of Blackacre at his death, it is evident that it is the character impressed upon the thing devised of descending to the heir, and to which the testator is supposed especially to refer, which is seized upon by the Court to justify them in thus narrowing or changing the general term heir-at-law or right heir, so as to mean his special heir, or heir *quoad hoc;* and their desire to follow that canon of descent which requires the heir of an

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One between the two sides of the half-blood heirs.

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estate to be of the blood of the first purchaser. But in case of a bequest of personal estate to the testator's heir-at-law, when he has no special heir, there is no reason for departing from the plain and obvious meaning of the term, nor is there any character impressed upon the thing devised which can restrain it to the blood of the first purchaser. For I do not join in inclination of opinion with Sir R. Pepper Arden, who, in the case of *Holloway* v. *Holloway*,* was inclined to think, though he did not assert nor decide, that a bequest in trust for "such person as shall be my heir or heirs-at-law," should be construed "heirs *quoad* the property," meaning "next of kin." But I concur with what he was further inclined to say in the same case, "that in such case the Court would consider the testator as the first purchaser," and, as a consequence thereof, would give a bequest of personalty to "my heirs-at-law," or "right heir," or "lawful heir," the same designation as if it had been a devise of lands acquired or purchased by the testator.

* 5 Vesey, jr., 399.

But to apply these principles more especially to the case before us. The testator left at his death a nephew, A., of the paternal half-blood, and a nephew, B., of the maternal half-blood (who, for our present purpose, may represent the two stocks of relatives,) and a cousin, C., of the whole blood *ex parte paternâ*. C. was his heir presumptive at the time this will was made, in 1791. But when a testator describes his heir-at-law, or lawful heir, as the person that shall take his property, he intends such person or persons as shall be found to sustain that character or description at the time of his decease, by the law of the country of his domicil. By the law of Pennsylvania, the persons who would answer to that descrip-

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The Court's Opinion.

Consideration of the 6th Question. One between the two sides of the half-blood heirs.

tion in 1824, when the testator died, are A. and B. By that law, they together constitute the lawful heir of the testator in the abstract or *simpliciter*, and are preferred to C. They take the personal estate by purchase, as the persons described in his will. There is no real property which either would take in exclusion of the other. The terms heir-at-law, or lawful heir, as descriptive of the person to take, are not narrowed by accident to a particular subject, nor are we required to look to the exception in the act, or compelled to give to general terms a special application, in order to conform to a principle of law which excludes the heir general, in order to continue the inheritance of the blood of the first purchaser. The exception in the act, which constitutes one of them as heir to the exclusion of the other, through an accidental quality attached to the thing to be inherited, has not occurred, and the question of preference does not arise. Being, therefore, equally within the description of persons entitled to take under the will, they must take jointly.

2nd. Considering his unfounded belief that he had real estate.

2d. "Can the evidence of the testator's unfounded *belief* that he was owner of certain property devised to him, be received to show an intention different from that expressed in his will?"

In construing wills it is often necessary to receive parol testimony, as to the property and persons described in it, in order to apply the devises and bequests to the proper persons and things. And in this way a latent ambiguity may be discovered, which must of necessity be resolved by testimony of the same description.

Now, as we have seen, the reason for construing the general terms of description in a special or nar-

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rowed sense, arises from the disposition of the courts to favour the policy of the law, which confines the descent of real estate to the blood of the first purchaser, and the presumption that such was the intention of the testator. And, admitting, for the sake of argument, that the half-blood *ex parte maternâ* would have been excluded by this description, if the testator had died seised of his paternal estate, what evidence have we that he would have given it a different destination from that which it now receives, had he believed otherwise? He did not know, when he made his will, that, before his death, the law of descents would be changed in Pennsylvania, yet, having willed that the law, as it existed at the time of his death should designate the person who should take his property, what right have we to say that he would have made a different will, if he had anticipated the fact of its change? He lived thirty years after the law was changed, and did not change his will on that account. He lived long enough to satisfy any reasonable man that he never would regain his paternal estate. The statute of limitations had twice run against his fancied claim before his death, and yet he made no change in the designation of the person who should take his estate, but left it to the law to settle that question, as the case might be, at his death. We have refused to receive evidence that he lived and died in the belief that his lawful heir would be the son of some of his English cousins. His will, clearly expressed, could not be interpreted by his false notions, because it would be conjecture to say that he would have changed his will had his notions been different. It is equally conjecture to presume that he would have changed it, had

Ap'l Sessions, 1853.

The Court's Opinion.

Resolution of the 6th point. One between the two sides of the half-blood heirs. Awards estate to heirs general.

he entertained correct ideas as to his real estate. The testimony introduced on this subject is to limit the description of his devisees, or rather to change the destination of his property, unambiguously expressed, both as regards persons and things, to a different person or class of persons, by declarations of the testator of an absurd belief, when it cannot be proved that he would have given a different destination to it, if his knowledge or belief had been different. Such a construction, founded only on conjecture, would annul the statute of frauds, "and leave titles depending on intention to the decision of chance and the sport of opinion."

I am of opinion, therefore, that both stocks of half-blood are equally entitled to the property in dispute, and take it under the description in the will, as "heir-at-law" or "lawful heir;" and that a different intention, in favour of one class to the exclusion of the other, cannot be inferred, from the fact that the testator had mistaken notions in regard to his ownership of real property, at the time he made his will and afterwards, and that such evidence cannot be received to narrow the construction of the clear, unambiguous description of his will, as connected with the actual situation of the property and persons referred to in it.

Let me now say, in conclusion of this long pending, important and difficult case, that although made after careful investigation, and with an anxious desire to arrive at the truth, I feel that my opinion is not so certainly right, as I could desire to feel that it is. And that it is a source of great satisfaction to me to believe that it will be reviewed by my bre-

threm and myself in the highest tribunal of the country.

[EQUITY DOCKET, NO. 1, APRIL SESSIONS, 1828.]

From the final decree of the Court, which was in conformity with the opinion above given, appeals were taken to the Supreme Court by the heir at common law, and by the Harrisons', so far as related to the parts of the estate from which they were excluded: the question of *domicil*, passed upon in the case of *White* v. *Brown*,* along with the evidence in that case, *which was all documentary, being also* taken up with this decree. The parties of the half-blood, here again joined their force.

Appeal to the Supreme Court of the United States.

* 1 Wallace, Jr., 217.

Their counsel, maintaining the Pennsylvania domicil, contended that the fact had been established by the verdict of a jury, upon an issue directed for that purpose by the Court below: that the judge who directed the issue, was satisfied with the verdict, and refused a new trial: that under such circumstances, a very strong case must be made out, in order to induce an Appellate Court to send the cause back for a new trial: and that the law upon that subject is well stated by Lord Lyndhurst in *Collins* v. *Hare*,† in these words, "As the issue was directed for the purpose of informing the conscience of the equity judge, if the main object was gained it was sufficient. The judges both at law and equity were satisfied with the verdict, and therefore it must be a strong case indeed, that should induce your lordships to send the matter to a new trial, in opposition to the opinion of the late noble chancellor of Ireland, who had a much better opportunity of investigating the facts on which the case mainly depended, than your lordships have."

Argument in favour of rejecting verdict of domicil.

† 1 Dow, New Series, 139.

An examination of the evidence, which was made by the counsel of the half-blood, showed, they contended, that the weight of it was altogether on the side of the American domicil.

On the other hand, the counsel of the heir at common law, contended that, the testator's domicil was England; that the verdict of the jury interposed no obstacle to a decision conformably to the evidence which appears on the record; that the object of the issue was to instruct the conscience of the Chancellor, and like all the other proceedings in the Circuit Court, is the subject of review in the Supreme Court: that "the Chancellor may, if he thinks fit, make no use whatever of the verdict, but treat it as a mere nullity."‡ They cited a Pennsylvania case, where, on an appeal, the Supreme Court disregarded a verdict, reversed a decree made in conformity to it, and remanded the case, without sending it to another jury, with instructions to the inferior court to enter a different decree. They relied on the opinion of Coulter, J., who, in delivering the opinion of the Court, said: "It was contended by his counsel here, on the argument, that the verdict ought to be, and is conclusive. In a Court proceeding according to the forms of the common law, the verdict of a jury is of high import and great solemnity; although, even then one verdict is not conclusive in any case, if against the weight of evidence. The Court may set it aside, and grant a new trial. But in a Court of equity, its effect and function is entirely different. In that Court it is used merely for the purpose of informing the conscience of the Court, and

‡ Gresley upon Equity Evidence, 405; 6 Maddock, 58, 113; Harrison v. Rowan, 3 Washington, 590.

Ap'l Sessions, 1853.

Appeal to the Supreme Court.

Argument in favour of adhering to verdict of domicil.

is incidental and auxiliary. A Chancellor cannot, if he would, surrender his high prerogative and duty of deciding upon facts, according to the convictions of his conscience. In that Court, the wisdom of our ancestors deposited the faculty of deciding upon facts within its jurisdiction, as well as determining the rules of equity applicable to them. And where, after all, could the power be more safely lodged, especially in cases of trusts and fiduciary transactions? Long experience, the habit of sifting and comparing testimony, calm deliberation and exemption from local prejudices, seems to give a guaranty for enlightened judgment. A Chancellor will examine the notes of evidence by the judge who tried the cause, listen to the explanation of counsel, and, at last, if his conscience is not satisfied, will decide the cause according to his own convictions, and disregard the verdict of the jury."

The counsel argued that there is no writ of error in the case of an issue directed for the information of a Chancellor, who may after all, disregard the verdict, and that if the verdict enter into the decision of the cause, they had no other remedy than an appeal, which must necessarily be co-extensive with the final decree of the Circuit Court.*

* Commonwealth v. The Judges, id. 302.

Domicil, they argued, is a mixed question of law and fact; that it is not the verdict, but the evidence, which exhibits the facts from which a correct estimate may be formed of the sense in which the testator used the language in his will; that the jury disregarded the only facts of importance in the controversy; the testator's education and residence for more than fifty years in England, his English doctrines, prejudices and associations, his long absence from Pennsylvania, his embittered feelings towards that State, and every other consideration, calculated to cast light on the meaning of the terms he used, &c. And they went, as did the counsel of the heirs of the half-blood, over the whole case of *White* v. *Brown*, already reported.†

† 1 Wallace, Jr., 217.

The Supreme Court heard, at great length, the argument on both sides, as to this question of domicil, as well as upon all the questions reported in the present case. But no opinion was ever delivered in that tribunal. The Court was equally divided as to affirming the decree;‡ and it was therefore simply affirmed. It was understood by the profession, that the chief difficulty with their Honours was, the the question of domicil: and it is, perhaps, not easy entirely to reconcile the verdict in the case with certain parts of the language of the judge who gave the opinion of the Supreme Court delivered at the same term, in the case of *Ennis & al.* v. *Smith & al.*, involving the question of the domicil of General Kosciusco.§

‡ See Brown v. Aspden, 14 Howard, 25.

§ See 14 Howard, 400.

On the effect in law of a judgment by an equally divided Court, see *Krebbs* v. *Directors of The Carlisle Bank*, note, ante, p. 49.

EX PARTE PLITT ET AL.

[CLERK'S COMMISSIONS: COSTS: COUNSEL AND CONTINGENT FEES.]

A clerk of the Circuit Courts of the United States is not, under the act of February 26th, 1853, relating to 'Clerks' Fees,' nor otherwise, entitled to commissions for "receiving, keeping, and paying out money," unless the fund has actually passed into the Court, or through the clerk's official hand, or has been agreed to be considered as having done so. The fact that the money is subject to the decree of the Court, it not being *in* the Court's registry, is not enough to give the clerk a right to commissions.

A fund in the hands of an intestate's administrator, upon which a decree of this Court has acted, or is acting, is liable to three classes of charge: 1st. The necessary expenses of ascertaining it, and reducing it into possession. 2d. A reasonable compensation for its safe keeping, and the supervision of its interests. 3d. The expenses of ascertaining the proper distributees, and making distribution among them. Accordingly,

Under the 1st head the Court allowed a party who had claimed as next of kin (though unsuccessfully as to any part) a whole fund in an administrator's hands, the actual expenses of a foreign commission obtained by him under implied authority of the administrator, a stakeholder, to show that certain funds abroad were assets of the estate, and so increase it. And also allowed him a sum for his expenses and trouble successfully exercised in the same implied way in obtaining indemnity from the estate of a former administrator, who had committed a devastavit and died. But would allow no part of the expenses, nor any compensation for long, wearisome, and great trouble, to which he had been put in that part of his efforts which were made in his own behalf alone; and which, unlike the former ones, had not in their result enured as above mentioned to the benefit of the opposing claimants, who had been now recently and finally decreed entitled to the whole fund.

Under the 3d head the Court allowed another unsuccessful party claimant of the whole fund, the actual costs and expenses to which he had been put in showing the relationship of all parties to the intestate, thereby enabling the Court to give what it deemed a proper direction to the fund; although this party's object in showing this relationship had been to show a state of facts which, as *he* supposed, and in argument contended, gave *him* a right to the whole fund. But the Court allowed him nothing more; and, as on the former case, would allow no part of the expenses, nor any compensation for long, wearisome, and great trouble to which he had been put, in that part of his efforts which were made in his own behalf alone; and which, unlike the former ones, had not in their result enured as above mentioned to the benefit of the opposing claimants, who had been now recently and finally decreed entitled to the whole fund.

Under this 3d head the Court allowed the counsellor of a special class of claimants who, by consent of another class, having, up to a certain point but no further, an interest common with this special class, and by order of Court, had

rendered great professional service to the whole class, *before* the point where the interests of the two classes diverged, a counsel fee of $6000, or ¾ of one per cent. upon a fund distributable. The Court considering that there was no doubt of its power where a fund is within its control, to take care of the rights of the solicitors who have claims against it, whether for their costs technically speaking, or their reasonable counsel fees; and regarding such persons in no other light than as meritorious assignees of a part interest.

The Court makes some extra-judicial remarks, in reply to argument at the bar, upon what are called contingent fees, or fees stipulated beforehand to be paid on the successful result of the litigation. It speaks of the practice of making such stipulations as not to be generally commended, exposing honourable men to misapprehension and illiberal remark, and giving the apparent sanction of their example to conduct which they would be among the foremost to reprehend. And though the Court remarked that such contracts might sometimes be necessary, in a community such as that of Pennsylvania had been, and perhaps as it is yet; and that where they have been made in abundant good faith, *uberrimâ fide*, without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client;" the Court would hold them valid; yet they remarked further that it was almost unnecessary to say, that such contracts, as they could scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification.

A case before the Court being an exceptional and very peculiar case, where there was a large fund left by a bachelor, with doubtful domicil and of uncertain sanity, without any near relatives, but vast numbers of remote ones, to his "heir-at-law or lawful heir," where the claimants were very numerous, poor, scattered about the world, having fractional interests, and quite unable to pay counsel for maintaining what after a quarter of a century's hard litigation, and without any compromise, was decided to be their just rights; and where the Court knew the whole extent of the counsel's labours, and knew also the rate of commission, and the whole extent of the gross sum received by them; such a case was regarded by the Court as illustrating very fairly the *occasional* policy of such contracts. And in the case of a fund of $800,000 or thereabouts, the Court did not consider as unconscionable a stipulation for a contingent compensation of 7½ per cent.; it being by the terms of the contract divisible between three counsel, the suit having been pending for 25 years; having required an enormous mass of testimony from England as well as here; having been argued three or four times in this Court, and as many times before the Supreme Court at Washington; and having been finally adjudged there only by an equally divided Court.

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Two cases in previous parts of these Reports* give an account of Mathias Aspden and his estate. This man was a bachelor of selfish, secluded, and ridiculous habits, and indeed of rather doubtful sanity, who,

* White v. Brown, 1 Wallace, Jr., and

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born in Pennsylvania prior to the Revolution, left the country on that event, and after an unsettled and strange life, died in London, in 1824, leaving a large personal estate to his "heir-at-law," or "lawful heir." A variety of circumstances connected with a very doubtful place of domicil, and with questions of fact and of law, made it quite a difficult matter to decide who, under these terms, was to take the estate. One John Aspden, of Lancashire, England, claimed it in 1828, and after a long and able argument on the whole law and merits, before this Court, when the late Justices Baldwin and Hopkinson sat here, the Court "had no hesitation in expressing its most decided opinion that he was entitled to the whole estate by the fixed rules of law:" and to him accordingly the whole estate was decreed to go. From this decree the case was taken to the Supreme Court of the United States, where, in January, 1835, without any opinion on the general law or merits, the decree was reversed and the case remanded for further proceedings, because there was no allegation in the pleadings as to the place of the testator's domicil; a matter which, when the case was below, the counsel on both sides and the Court, had considered as either sufficiently alleged or of no importance.* In the meantime another John Aspden, to wit, John Aspden, of London, had appeared, claiming to be the true heir. Both these parties claimed the estate against one another, and they both claimed it against a large number of persons, heirs by the Pennsylvania statute law. *These* heirs, too, being divided into two classes, some coming *ex parte paternâ* and others *ex parte maternâ*, at a later stage of the case claimed against one another, as until they had disposed of

Aspden's Estate, ante, p. 368.

* Harrison v. Nixon, 9 Peters, 483, and Appendix, id. II. and III. p. 770.

O. T. Sessions, 1853.

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these persons they did jointly against the heirs real and pretended at common law. The claim of the heirs *ex parte paternâ* was to all the estate, while the heirs *ex parte maternâ* claimed to share it with them in the rates of 32 parts to 3. With a few exceptions nearly all these half-blood parties were poor, common and rather ignorant people, including old women and children. They were scattered over the whole country; most of them were unknown to each other prior to this suit, and after they became acquainted by it, were bound together by nothing in common, but the cohesive power of one interest. New claimants, too, were constantly turning up, having been fished out by somebody who had proved to their satisfaction a relationship with Aspden. But even this bond of a common interest in a large pile of money, pressed unequally upon these parties. A few took a very active part. Others took an inert part: some would take no part at all.

In the earlier history of the case the late Mr. *B. Tilghman* and Mr. *Newbold* were the principal counsel of these last mentioned—the half-blood or statutory heirs. But there was a host of other counsel of all grades of character and importance, or of no character and no importance, hanging on the skirts of the case, and representing some small interest in it just sufficient to warrant an appearance in the court room. Some parties had no counsel; and some counsel, if they had any parties, took very little pains to represent them. *All* the counsel, of course, could not argue the case at Washington; and after an appeal there in 1833, Mr. *B. Tilghman* and Mr. *Newbold* were designated at a meeting of several principal and some inferior counsel, to take care of the case at

Washington; it being understood that a third counsel, who practised habitually in the Supreme Court there, should be taken into it, in that city. *A commission of 7½ per cent. contingent on the amount to be recovered*, was—the witness could not say, agreed on—but was 'named' as a compensation to these three counsel, who it was understood "would be rendering a general benefit" to both sides of the half-blood. And Mr. *Newbold*, before going to Washington did obtain agreements in writing from some of the parties in this form, st.: "We do hereby agree, each for himself, to pay J. L. Newbold seven and a half per centum, on the amount that shall be recovered for us out of the estate of Mathias Aspden, deceased, when the same shall be received, for prosecuting our claims upon said estate before the Supreme Court of the United States, in the case of *Pucker* v. *Nixon*, now pending before said Court, and do hereby constitute him our attorney for said purpose." Mr. *Newbold* did not expect to claim for himself this amount, but expected that all interested would sign similar papers, and that the amount would be divided into three equal parts, 2½ to Mr. *Tilghman*, 2½ to himself, and 2½ to the third counsel at Washington. Messrs. *Newbold* and *Tilghman* now proceeded to Washington, where they called on the Honourable Daniel Webster, Esquire, at his residence on the morning that the case was to be argued, and a short time only before the Court met: and begged his professional assistance in the case. They told him what had been agreed upon. And speaking of professional compensation, Mr. Webster asked whether they could not get something as they went along —'enough, at least,' as he pleasantly asked, 'Enough,

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at least, gentlemen, to nib the pen?' Mr. *Newbold* told him that it was out of the question to expect any money now from the parties, most of whom were too poor, and others too doubtful of success to risk any money in fees. Mr. Webster assenting, as one witness 'understood,' to these terms, went with the counsel to the Supreme Court where the case was almost immediately called, Mr. *Newbold* stating it, and Mr. *Webster* taking notes. On the second day's argument, one of the judges in an *obiter* way apparently, asked counsel if there was *any averment of domicil in the pleadings*, to which Mr. *Newbold* replied negatively. The matter was not further alluded to by the Court. But after the adjournment on that day, Mr. *Webster* remarked to his colleagues that he thought there was "*much significance*" in that question which the Court had asked about the averment of domicil: and after the consultation with them that evening, he himself moved the Court on the following morning to suspend the argument and send the case back to amend the pleadings. A day was fixed to argue this point and it was argued by Mr. Webster's colleagues, though not by him; he being engaged elsewhere: and after argument on the other side, and a warm opinion of dissent from Justice Baldwin, the Court did reverse the decree and send it back as Mr. Webster had moved. The report of the case as given by the Supreme Court Reporter, does not refer to the matter as having been suggested at all by the Court; stating simply* that "At a subsequent day of the term, when the cause came on for argument upon the merits, *a question was presented by Mr. Webster*, who, with Mr. Tilghman and Mr. Newbold, was the counsel for the ap-

* 9 Peters, 494.

pellants; whether the bill taken by itself, or in connexion with the answer, contained sufficient matter upon which the Court could proceed, and finally dispose of the cause. It was submitted, that the bill contains no averment of the actual *domicil* of the testator, at the time he made his will, or at any intermediate period, before, or at his death. The Court directed this question to be argued, before the argument should proceed on the merits." As soon as the Court ordered the argument on his motion, Mr. Webster said to his colleagues, "I will take no part in this. You, gentlemen, will." "He seemed," said the testimony, "to think that *there could be no doubt about the result.* He thought the Court would send the case back for want of that averment. "His colleagues made no objection when he said that he would take no part in the argument of the motion. There was no evidence that he was ever afterwards applied to, or took any part in the cause. And as he had been expected to act only at Washington, the question which—after the 1st argument there and the 2nd one hereafter mentioned—arose between the two classes of half-blood, for *both* of whom he had been engaged, was suggested as a reason why he might not have felt at liberty to do so. It was a reason why other counsel similarly situated did not. There was no evidence that Mr. Webster had ever made any stipulations of any kind, with any body, about his fees and it was certain that he never either asked or received any thing. The case, as is hereafter stated, was decided in this Court in favour of the parties for whom he had acted some months before his death in the fall of 1852; and a difficulty in the Supreme Court which prevented at least any

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reversal of that decree was known in the Sping of 1852; a considerable time before it also. He had neither made any record of his own about his fee, nor preserved any from other counsel; though Mr. Newbold had many for himself and his colleague, Mr. Read. Neither Mr. Webster's family, nor his testamentary executor had ever had from him the least intimation of his claim of any fee in the case. The executor derived his first knowledge of the possibility of right from a friend of Mr. Webster's to whom Mr. Josiah Randall, who had been engaged on the other side, had communicated it; and in consequence of this information, apparently, the matter was now presented. The executor of Mr. Webster here represented by Mr. Randall did not ask to have the matter rested on any agreement for contingent compensation; but that the Court "would order *such* an allowance to be made in compensation for Mr. Webster's services as should seem *fair and equitable.*"

It appeared that although Mr. Webster had never preferred any claim of any sort on any fund, yet in discussion among counsel, Mr. Newbold, who had received his fees based on the contingent arrangement, had said that as Mr. Webster had been spoken to, and was an eminent man, he ought to receive a complimentary fee; and that if no one else would pay it he, Mr. Newbold, would pay $1000 out of his own fee. So far as concerns the claim preferred in behalf of Mr. Webster.

After this reversal at Washington already spoken of, for want of an averment of domicil, and the remission for further proceedings, the case, of course, came back here. But in the mean time the former

justices, Baldwin and Hopkinson, had departed this life, and new judges, st. the present judges Grier and Kane were now upon the bench. The whole matter came of course before them. The first thing which they did was to order an issue for trial by a jury to settle the place of Aspden's domicil: and that the parties "should respectively designate three counsel on each side by whom the said trial should be opened and argued." At this stage of the case the interest of the half-blood or statutory heirs—whether coming paternally or from the mother's side—was still a common one. They were both seeking to establish a Pennsylvania domicil, and so weaken the case of all persons who might be heir by the Common Law of England, and who were seeking to establish an English domicil, and so give to the "heir at law" the whole estate by making the term 'heir at law,' synonymous with "heir by the common law of England."

In pursuance of the order a little above mentioned, Mr. *B. Tilghman*, Mr. *Read*, and Mr. *H. D. Gilpin*, were designated by the Pennsylvania statutory heirs as the counsel by whom this question of domicil should be 'opened and argued' on their behalf. *The opening fell to Mr. Gilpin.* The evidence of domicil —some exhibition of which the reader will get by reference to the case of *White* v. *Brown*, already reported*—was entirely documentary. It was enormously voluminous, extremely detailed, uncommonly discrepant: and from the absurdity of the principal character in it, old Aspden—a mere zany—positively disgusting to any study of intelligence. To this huge pile of record evidence, Mr. *Gilpin* had given a most attentive and pains-taking study. He had diligently hunted up from its extent and from its

* 1 Wallace, Jr., 217.

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corners, everything which could bear upon the case; and picking it out from the disorderly congeries of an immense paper book, had put it all together in a neat, arranged, and lucid narrative. The result of the whole was, that he presented his own case in its best aspect, and presented the opposite case with all the strength in which it was possible to present it, *and yet keep it throughout, strictly subordinate to his own.* The opening occupied several days, and was very full. Admitted principles of law were brought in to bear on the case as thus presented, and the jury, understanding what they *did* understand, thought they understood every thing; and pretty much decided the case, when they had heard it stated by one side. Having been a good deal exhausted with the exercise of a long continued attention, they would hardly attend again to the supplemental kind of opening which Mr. *Gilpin* had made necessary for the other side; nor to the attempt of that side to show that this opening, which *appeared* to present a genuine and entire case, was in truth the effect of skilful collocations, of selected points of view, and of illusive casts of light; and that the pieces of the puzzle which—arranged by the adjustment of painful ingenuity—produced a figure of *one* aspect, could, by another process of less pains, and as much truth, be as well arranged to present a figure exactly the reverse.

This opening gained, or was very instrumental in gaining, the verdict of a Pennsylvania domicil; and that domicil in truth gained the whole cause:

For the domicil being settled to be in Pennsylvania, the new judges decreed exactly opposite to the former ones, and that the estate should not go to the

heir by the common law of England, whether he were John Aspden, of London, or John Aspden, of Lancashire; but should go to the heir (which they held to be a *nomen collectivum*) by the statute law of Pennsylvania; the heirs of the half-blood already mentioned.

Then sprung up, unexpectedly, a second and new question between this class of heirs; that division of them which came *ex parte paternâ*, claiming, on certain grounds, the whole of the estate, to which, in an earlier stage of the case, and before the point was supposed to be one which would arise, the Court had strongly intimated they were entitled; and the heirs *ex parte paternâ* claiming to share $\frac{3}{13}$ths of it with them. Mr. *Gilpin*, who had been originally retained by the maternal heirs alone, now fell back to his original and more defined position, and maintained, both in this Court and at Washington, with great labour of argument, against Mr. *Read*, who, having been retained by the maternal heirs alone, sided now with them—the claim of the paternal heirs to the whole $\frac{3}{13}$ths. But, as the result proved, that claim was not allowed either there or here; those heirs having got but $\frac{3}{13}$ths.

From the decree of the Circuit Court here, which first made this decree, an appeal was taken to Washington. The case was there elaborately argued in May, 1852, by Mr. J. Randall, in behalf of one Jackson, M. D., who had been appointed in this country administrator *de bonis non* of John Aspden, of Lancashire, one of the persons who had claimed to represent the heir by the common law of England; and the Court suspending its opinion in an unusual

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way, "it reached the counsel of Dr. Jackson, that the Court were embarrassed by the suggestion, that there was a material point that had not been taken by any of the counsel in the argument of the cause." The recollection of Mr. Randall, who was one of Dr. Jackson's counsel, and was here his witness,(A) was, "that this fact was stated by one or more of the letter writers from Washington, in the public newspapers." He was likewise informed that Mr. Reverdy Johnson and Mr. Berrien had both made the same statement, with the remark, that it was extraordinary that so many Philadelphia lawyers had been arguing a cause, and had neglected to touch upon the real point of the case." Mr. Randall "examined the various aspects of the case with as much sagacity as he could, and came to the conclusion that the point omitted was, that after the death of Mr. Nixon there was no legal representative of Mathias Aspden recognised by the laws of England, and that it would be very important that Dr. Jackson should obtain letters of administration in London, and be substituted in the place that Mr. Nixon occupied at the time of his death." He "consulted with Mr. Hirst, who had been counsel in a collateral question in the argument," and Mr. Hirst agreed in this opinion of Mr. Randall's. Mr. Randall had taken "a great deal of pains to ascertain whether these surmises were correct or not," though, of course, he "had no correspondence or communication with any one of the judges on the subject," but he "left this

(A) No objection was taken under the Rule IV. of this Court, relating to *Attorney and Counsel*, which says, "No attorney shall be accepted as security for costs, nor as bail of any kind, nor *to testify in favour of his client*, except as to matters which are provable by the affidavit of a party."

country under a firm belief that the information was correct;" though he was never able afterwards to find it so.

Dr. Jackson, who was a medical professor in a University at Philadelphia, very reluctantly acceded to this proposition of going abroad; spoke of the injury which would be done to his profession by his absence, and said that nothing but an imperative sense of duty would induce him. Mr. Randall urged him to go, and promised to accompany him, which he did. They sailed on the 15th of June, 1852, and returned some time in October. "After Dr. Jackson arrived in London, he was put," said Mr. Randall, "to much inconvenience; compelled to remain a longer time than we expected; and I think more than a month after myself. I left him behind. The solicitor selected required him to be in London on the 8th of October, and he sailed some days after that, I think on the 13th. His request was finally refused; at least he never did receive letters. The course of medical lectures, of which he was professor, had commenced before he returned, to the detriment of himself and of the University, as was alleged by his brother professors." After Dr. Jackson arrived in London, in the end of June, being told that nothing could be done until September or October, he made a continental tour to Havre, Paris, Brussels, Aix la Chapelle, Cologne, Wiesbaden, Frankfort, Baden Baden, Strasburgh to Paris, Boulogne, &c., to London; the expenses at which places, on the continent, Mr. Randall testified was about half the expense of remaining in London; that place, so far as he knew, being the dearest, and Baden Baden, where Dr. Jackson remained two days,

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the cheapest. The whole expenses of his journey abroad, were $1697.70.

Dr. Jackson had previously to setting out to get these letters of administration in London, been appointed by the Orphans' Court at Philadelphia administrator *de bonis non* of John Aspden, of Lancashire, already mentioned, and had given bond with sureties in the large sum of $670,000; and "from the time of his appointment zealously and laboriously attended to its duties." Consultations with counsel were frequent, and Dr. Jackson put aside all professional and other avocations to attend to these meetings. He attended upon the counsel when the argument was prepared, and he also, at the request of his counsel, attended at Washington at the argument before the Supreme Court, in May, 1852. The counsel on all sides who attended Washington at that time, had by consent of each other obtained an order of Court to take out of the fund a certain sum for their expenses in attending that argument. No provision was made for Dr. Jackson, who, Mr. Randall testified, "had received nothing from any source to reimburse himself the sums he had expended, nor any compensation for the services he had rendered," whatever they were. There was no doubt that Dr. Jackson had devoted a great deal of time to following up the case; and had made himself master of all that it became him to know.

The case having been argued a second time at Washington, in December, 1852, by Mr. Read and others, including Mr. Gilpin, on appeal from the decree above mentioned of the new judges, that decree (by an equally divided Court)* was affirmed; and

* See Brown v.

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the fund amounting to near $800,000, was now to be distributed.

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It had never been 'paid into Court,' nor agreed to be considered as paid into Court, though under orders of the Court the administrator had frequently paid expenses incident to the suit. After the death of old Aspden's surviving executor, who had devastated part of it, it passed to an administrator *de bonis non*, the defendant in the original case, who still held it, and had been paid for holding it, by an allowance in the Orphans' Court of the State where he had settled his administration account. Submitting himself constantly to the orders of this Court, he had frequently paid out certain comparatively small sums under those orders certified by the clerk; these being for expenses of printing, &c., &c., and for payment by consent of certain principal counsel on both sides, to them both for their expenses in being at Washington to argue the case there. For convenience, apparently, these sums had sometimes passed through the clerk's hands.

Aspden, 14 Howard, 25; and Aspden's Estate, ante, p. 452.

An act of Congress, passed on the 26th of February, 1853, under the head of "Clerks' Fees," provides that there shall be allowed to the clerk of the Circuit Court "*for receiving, keeping and paying out money in pursuance of the requirements of any statute or order of Court, one per cent. on the amount so received, kept, and paid.*" A former fee bill was to a similar but not more favourable effect.

The two Aspdens (against both of whom, irrespective of the question which was between themselves, of true heirship at the common law, the case had been decided) had expended a good deal of money and had had a great deal of trouble about the

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case. From 1826, when John of London first made his claim, till May, 1852, soon after which time it was decided against him, that John had expended $7226.10, for travelling and lodging expenses, counsel and clerk fees, printers' bills, and very moderate allowance to himself for trouble and loss of time through this term. A small part of his *expenses*, $1750, but a good deal of his trouble had been caused by a breach of trust in the sole surviving executor of old Aspden, the testator, and by exertions to obtain a lien in one of the State Courts at Philadelphia against the executor's estate; which lien he did obtain, thereby saving a loss of many thousand dollars to old Aspden's estate. Another item of his expenses was the cost of a commission, $92.50, at an early date; the effect of which was to prove the testator's personal property in England.

John of Lancashire had expended $2502.85, generally on accounts similar to those of John of London's, except in regard to services against the defaulting executor, and in regard to proving the testator's property. John of Lancashire had laid out no money on these account, but he had laid out about $1197.42, for costs and expenses connected with commissions abroad, which showed the whole relationship of the respective claimants, *of all sides*, in the case, to old Aspden, the common testator. He had never made to himself any allowance for time or trouble.

The bulk, thirty-two thirty-fifths, of this large fund was paid over to the counsel of the largest representatives of the half blood, Mr. Read, Mr. Newbold, and Mr. B. Tilghman, who retained among themselves, and independently of any reference to Mr. Webster, the 7½ p. c. originally named; but

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a portion, about $60,000, of the distributable fund, was reserved for further order; and several claims, the subject of this case, were now made upon it.

1st. *George Plitt*, Esquire, clerk of this Court, represented by Mr. *R. P. Kane*, for the payment to him out of the fund, of 1 p. c. upon the whole distributable fund.

2d. *John Aspden, of London*, represented by Mr. *M'Laughlin*, for a bill of $7226.10, for his expenses and trouble as just above stated.

3rd. *John Aspden, of Lancashire*, represented by Mr. *Markland*, a bill of 2502\frac{85}{100}$, *with interest*, for his expenses, as also above stated.

4th. Dr. *Jackson*, represented by Mr. *Randall*, a claim of *quantum meruit*, "for care and trouble as administrator of John Aspden, of Lancashire, heir at common law of testator, and for his costs and charges in the performance of the duties of that office," of which claim his bill for $1697.70, the expenses of his European tour, was one item.

5th. The testamentary executor of the late Honorable *Daniel Webster*, Esquire, represented by Mr. *Randall*, for "such an allowance, in compensation for his services, as should seem fair and equitable."

6th. *H. D. Gilpin*, Esquire, represented by Mr. *G. M. Dallas*, for $\frac{3}{4}$ of 1 per cent., or about $6000, "for services rendered by him on behalf of all the next of kin, under an order of the Court, and with the consent of all representing the said next of kin."

Argument. Against the claim.

Against these claims. 1st. *The Clerk's.* The money was never paid into Court. And though the administrator has paid out parts of it, under orders of the Court, which orders may have been certified

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Argument. Against the claim.

by the clerk, it has been no otherwise 'in Court,' than that it has been in contest and waiting a final decree; nor does the decree operate upon it, further than a decree would operate on a piece of land for a conveyance, of which a bill had been filed in equity. No one would say that this land was 'in Court.' The clerk has never either 'received, kept or paid' out this money. This has been done by the administrator, and the administrator has been paid for it. One decimation of the fund is enough.

2nd and 3rd. The claim of *the two Aspdens* may be disposed of together. They claimed an enormous fund. The game was well worth the contest. They pursued it, and with fair grounds of hope. But it has eluded them. It has been finally determined that they had *no right whatever* to the money which they claimed; that the property belonged entirely to other persons. Why shall these other persons be made to pay a large sum for having been disturbed and delayed for a quarter of a century in the enjoyment of their own property? property now decided to have been always and rightly theirs, and to have been by these present applicants, the Aspdens, all the while unlawfully withheld from them? The Aspdens have paid for a *chance*. They purchased a lottery ticket and drew a blank. What right have they to call on him who drew a prize, to make good the cost of their ticket?

4th. Dr. *Jackson's* claim stands much on the same foot. The fact that he was a medical professor, whose professional receipts have been greatly injured by his absence in Europe, was a sufficient reason why he should not have applied for this administration at all. From the nature of his professional duties,

he was certain to be unable to attend to it without injury to them. The supposition under which he went abroad, had no foundation in fact at all; and none even in imagination, beyond impertinent and loose rumours about private opinions of the Supreme Court, which it was nobody's right to know. He, too, embarked in a lottery; and has no right to complain that he has been paying for tickets that drew no prize.

5th. The case of Mr. *Webster* was never thought of by him, or by his executors; and comes into Court only because it has been invited. If he ever meant, at any time, to make a claim, it is clear that he himself abandoned it. While everybody else was keeping records and making charges, he kept no record and made no charges. The main controversy about Aspden's estate was disposed of in his life time, but a claim was never mentioned by Mr. Webster, nor heard of by those nearest and dearest to him. His son, his executors knew nothing of it; though these last, when *told* of it, could, of course, do no less than make it known. Under these circumstaeces, it is not just to his memory—a memory ever dear to his friends and to this country—to present a demand so unlike any ever presented by himself.

6th. Mr. *Gilpin* had his special clients *ex parte paternâ*, who paid him. What he did, enured, it is true, to the benefit of the claimants *ex parte maternâ;* but that was no merit of his. It has so enured, beyond his expectations and contrary to his design. Mr. *Gilpin* battled with the heir-at-law, because he himself claimed the *whole* fund for his own special clients. And after he had secured it from that heir to the heirs general on both sides, as he *had* to do

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Argument. Against the claims.

before he claimed it for his own clients, instead of taking his proper share of $\frac{3}{33}$ths, he sought to take it all. He abandoned the common field when he had vanquished an enemy, who, though common, was proper also; and who was fought, not because he was common, but because he was proper. Having turned all his arms against his allies, he now from them asks remuneration. Remuneration for what? For this only, that in spite of his ablest and earnest efforts to take these $\frac{33}{33}$ths from them, they have been strong enough to keep them to themselves.

And here, too, was a chance. The claimants *ex parte paternâ* were few. The whole of $\frac{33}{33}$ths of such a fund, was indeed a splendid prize. It was worth the winning, and worth the contest. The contest has been fought, but the prize has not been won. After a long, hard and honourable contest, others are in possession of it, and in possession rightful. It is theirs, and as is now decided, always has been theirs. In such a case resignation is becoming: and afterthoughts should have no place.

Mr. *M'Call*, who was with several others, counsel in opposing these claims, briefly but very ably, and with much dignity, argued in addition, 1st. That the taking of contingent fees, however reasonable it might appear in any particular case, was in its general effects so liable to abuse and so injurious to the character of the profession, that it ought not to receive the deliberate sanction of the Court, which was now for the first time in Pennsylvania invoked; and 2d. That the agreements for compensation in the case at bar were matters entirely between counsel and client, not amounting to assignments of the fund,

nor giving any lien on it: and therefore the Court had no jurisdiction to award their payment out of the fund.

In favour of the claims. *The clerk* has in some instances actually distributed the fund which was paid into his hands, though not perhaps technically into Court. No doubt, in those cases, he might have obtained a formal order of *payment into Court.* The claim of such officers to their commission should not be held down to technical observance, or they will be tempted to resort to forms and to delay (the result of them), to secure the commission meant to be allowed to substance.

In favour of the claims.

2nd and 3rd. *The claim of the two Aspdens* is more tenable. Here is an enormous fund in chancery, left by a fool—a zany—under peculiar facts and a will of most difficult interpretation. The claimants are scattered over the earth and seas. They are most of them poor. The rightful claimant is perhaps the poorest of all, and wholly unable to show his right. Will the Court give the fund to any claimant able to make a primâ facie case? Or will it make some effort to ascertain the rightful party? It wishes to inform itself; and unless the cost of information is paid by the fund, it will be paid by nobody, and the Court will not be rightly informed at all. Such a fractional part of the fund is most properly employed in giving the residue a legal and moral direction. A fund is constantly so used in the payment of auditors, advertisements, masters, jurors, &c.

4th. Dr. *Jackson* acted by the advice and more than the advice of counsel all through. He was urged, importuned to acquire the administration in

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ARGUMENT. In favour of the claims.

London, and went abroad animated by nothing but an imperative sense of duty, and in the performance of an act urged upon him by his counsel. He had no sinister design. He asks nothing but remuneration for actual disbursements.

5th. The claim of Mr. *Webster's* executors is eminently fair. Mr. *Webster gained this whole case* for these parties who now refuse a cent to his estate. His wonderful mind in an instant saw the immense meaning which lay in a casual inquiry of one of the judges, if indeed it was an inquiry of any judge; for the *reporter* states that the point of domicil was first raised by Mr. Webster himself. Whether or not, he took it up and followed it out. Some of the ablest counsel of Philadelphia had gone through the case before Judge Baldwin, without once raising that point. Yet who denies that this is the point on which the whole case has finally turned? Mr. Webster did not argue the case at Washington. And why? No doubt, in making his motion, in a few words, in one or two simple propositions—words and propositions which no man *could* have proposed but himself —he came like a sledge-hammer upon what, beneath his stroke, was first destined to give way. While other men were in doubt, he saw in one instant the inclination of the Court, and he saw that inclination was decision. "He seemed," says the testimony, "to think there could be *no doubt about the result*," and therefore, he said, "I will take no part in this: *you*, gentlemen, will."* He had done the work, and he left others, either on his own side or on the opposite, to undo it, if they could. He could sleep "in spite of thunder."

* Ante, p. 459.

Admit that, as an honourable barrister, he never

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ARGUMENT. In favour of the claims.

made a *contract* about his fees; that he took no writings, enforced no signatures, nor presented any claim. Is that an argument here before an honourable Court, the guardians of its officers and of its suitors both alike, and now having distribution of the fund and awarding it to all entitled? It is the highest tribute to Mr. Webster's purity and honour, the proudest testimony to his professional and personal character —his character as a barrister and a gentleman—that he did make no entries; that he did leave no records; did never present any claim for professional services; and that he never dreamt of looking at such matters in the spirit of an attorney or a broker. The application now brought forward in behalf of his executors does not profess to rest upon contract. Contract for contingent compensation is repudiated. Mr. Webster's testamentary executor asks "for such an allowance, in compensation for his services, as should seem *fair and equitable.*" Can the fees of counsel ever rest on purer, more honourable grounds?

6th. Mr. *Gilpin's* labour was immense. By the mere force of orderly and lucid statement, he gained a point before the jury which was referred to the jury alone. As a matter of fact, the heirs *ex parte maternâ* have gained vast benefit from his labours. All the counsel could not argue the point. Mr. Gilpin was appointed to argue it for all parties. He did argue it, and argued it successfully. He was entitled to compensation *then*, if it could have been foreseen that the statute heirs would finally gain the case away from the heir at common law. Up to a certain point the interest of the heirs *ex parte paternâ* and those *ex parte maternâ* was common. Each class of heirs understood that; and each was willing to pay

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Argument. In favour of the claims.

for a service *in fact*, no matter with what ulterior motive rendered. Each, after a certain point, was willing to trust to its own ability against each other. Both, before that point, were afraid of a common enemy.

It will not do in this country yet to argue against contingent compensations. In the interior country, especially, our people are poor. Our counsel anywhere, are not much richer. Certainly, the Court must keep a close eye upon its officers, and upon the least intimation of rapacity must probe the matter to its origin. It would of course set aside any unconscionable contract.(A) This case is free from imputation. Though for a quarter of a century there has been a huge fund, a mere prize for contest, no compromise has ever been made, except in one instance, where, under an order of Court, the expenses of counsel at Washington, on all sides, were allowed. The money has never gone into counsel's hands at all, nor by any consent among them. The bulk of the fund remains as it was. The case has been one of a long, hard, honest fight; "a regular pounding-match;" and the whole fund, after twenty-five years of fruitless and uncompensated toil to the counsel of the other side, now goes into the hands of the statute

(A) Mr. Justice Grier, who was present at the argument, though not at the delivery of the Court's opinion, here observed that these contingent fees were "very delicate affairs." They were not allowed at all in England, and had given rise in our country to great abuse in some instances. Still, perhaps, they would have to be tolerated awhile longer, especially in the country. This much he would say, that if the action of the Court were needed, it would disregard such a contract, and allow counsel what, under the circumstances, The Court deemed fair. On the other hand, he wished to be also understood, that the Court would take care of counsel who, in this country, often suffered from the stinginess of clients. If a client would not pay his counsel properly, and the Court could in any way get hold of the funds, it would order an allowance to him. And the Court would not suffer clients to receive money themselves, or to compromise a case "outside and over the counsel's heads," without first making proper compensation for their service and capacity.

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heirs. The application is made to the Court. The whole case is familiar to it. The extent, merits, and result of Mr. Gilpin's services are known to all, and especially known to the Court.

We need not speak at all of contracts for contingent fees generally. Our remarks would be extraneous to Mr. Gilpin's case. His claim is upon a professional *quantum meruit* "for services rendered by him on behalf of all the next of kin, under *an order of the Court* and with the consent of all representing the said next of kin." He could not have declined to render these services without having committed a contempt of the Court. The Court will see that his successful toil is liberally recompensed.

The opinion of the Court, Judge Grier having been absent at Pittsburgh, was delivered in substance as follows, by

THE COURT'S OPINION. December 1st, 1853.

KANE, J. The estate which has been the subject of litigation, remains in the hands of the *Administrator*. There has been no order that the fund, or the residue of it, should be paid into Court. It is therefore, as it has been, a fund subject to our decree, but not in our registry; within the judicial control, but over which that control is yet to be exercised. It is not moneys "deposited" in Court, or moneys "received, kept, and to be paid out" by the clerk. That officer has, therefore, no claim upon it, under either the former or the present fee bill, of the sort which has been contended for, except so far as he may appear, upon future taxation, to have disbursed any portions of it under the occasional orders of the Court.

Over and above the fees of office, this fund is subject to three classes of charge.

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THE COURT'S OPINION.

1st. The necessary expenses of ascertaining it, and reducing it into possession.

2nd. A reasonable compensation for its safe keeping, and the supervision of its interests.

3rd. The expenses of ascertaining the proper distributees, and making distribution among them.

All of these would be included by the practice of the English Chancery, in the general designation of expenses, or of costs taxable between solicitor and client; and as such, would in a case like this be allowed against the fund.*

* See the orders in Stanton v. Hatfield, 1 Keen, 358, and in Gaunt v. Taylor, 2 Hare, 413, and the opinion of the Vice-Chancellor in Thompson v. Cooper, 2 Collyer, 90.

In the first of these classes, we are disposed to include certain costs and expenses, which were paid by John Aspden, of London, for a commission to England, and in the early proceedings in the State Court at Philadelphia against the executor; and we add to these the sum of one thousand dollars, as a compensation for his vigilant and effective service in securing a very large amount of money to the estate, and in lieu of all expenses incurred by him in and about the same.

The *Administrator de bonis non* is the only person before us whose claim would have a place in the second class. He has, however, been satisfied for his expenses, care and trouble, by an allowance in the Orphans' Court, where he has settled his administration account.

Among the expenses of ascertaining the proper distributees of this fund, or, more properly speaking, as among the costs to be taxed under the decree, we allow the several charges incurred by John Aspden, of Lancashire, in and about the execution of commissions to examine witnesses abroad.

The claim of Dr. Jackson seems to us plainly out-

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side of all the classes we have indicated. His action did not contribute to the increase of the fund, or aid the Court in determining the mode of its distribution. He was the administrator in this country of one of the suitors for the estate, and he sought unsuccessfully to become administrator in England also. He failed to obtain a decree in favour of the interests which he represented; and we do not see that he has any other rights against the fund than the other parties who shared his failure.

The claims for professional services rendered in this cause by Mr. Webster and Mr. Gilpin, refer themselves to the third class of which we have spoken. We have no doubt of the power of the Court, where a fund is within its control, as in the case before us, to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees. We can regard them in no other light than as meritorious assignees of a part interest; and they are so regarded in the English Chancery.* The principle and the rule are fully established in that country by the cases which have been already cited; and these are sustained in the United States by the New York adjudications, both at common law and in equity;† and they are recognised by the Supreme Court of Pennsylvania.‡

* White v. Pearce, 7 Hare, 278.

† Pinder v. Morris, 3 Caine, 165; Bradt v. Koon, 4 Cowen, 416; Talcott v. Bronson, 4 Paige, 501.

‡ Balsbaugh v. Frazer, 7 Harris, 98.

Whether it was originally wise to invest the due compensation of counsel with the incidents of a legal demand, and whether the dignity, and with it the usefulness of the profession, might not have been better secured by leaving its members to a merely honourary recourse, has divided the opinions of intelligent and honest thinkers. But the question is

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now, and has long been a merely speculative one in Pennsylvania; and our Courts have either to remodel the law, or to enforce it as it stands, by admitting the lawyer to sue for his *quantum meruit.*

So, too, of the practice, which has obtained to a considerable extent, of stipulating beforehand for professional fees, contingent on the result of the litigation. It is not a practice to be generally commended, exposing honourable men not unfrequently to misapprehension and illiberal remark, and giving the apparent sanction of their example to conduct, which they would be among the foremost to reprehend. Such contracts may sometimes be necessary in a community such as that of Pennsylvania has been, and perhaps as it is yet; and where they have been made in abundant good faith—*uberrimâ fide*—without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client;" the Court will hold such contracts to be valid. But it is unnecessary to say, that such contracts, as they can scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification.

These general observations have been invited by some portions of the argument; they have no purposed application to anything presented by the facts before us. Indeed, the case may be regarded as illustrating very fairly the occasional policy of these

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contracts. But a small proportion of those, whose rights in the Aspden estate have been finally affirmed by the Courts, were in circumstances to support the long and costly litigation which those rights have undergone; and the compensation which they engaged to pay in case of success, though large in the aggregate, was altogether moderate, because contingent on the result. The gentlemen who have devoted, for so many years, and through so many discouragements, their talents, mature learning, and untiring energy, to the prosecution of this case through all its chances, have confessedly earned all that they have received.

Included in the per centage which was payable to them, was the agreed compensation for the services of Mr. Webster. But he was not directly a party to the agreement by which the clients bound themselves to the payment. His agreement was with the original counsel, and they were to pay him out of the fee they were themselves to receive. Whether his compensation was to be measured by one standard or another, whether it was specific or contingent as to amount, to be modified by reference to the extent and character of his services, or to be dependent solely on the amount recovered, we are relieved from inquiring. The clients have complied with the terms of their engagement; and the per centage which they engaged for, and to which Mr. Webster looked, has been paid out of the fund with the consent of all parties, to the gentlemen who were entitled, in the first instance, at least, to receive it.

In this the claim of Mr. Webster's executors differs from that which has been presented by Mr. Gilpin. The parties who were before us asserting title

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as the next of kin, were themselves divided in interest and right, and were represented by different and numerous counsel. In the progress of the cause, after it had come back to us from the Supreme Court, we directed a feigned issue to be tried at law between the asserted heir-at-law on the one side, and all those who claimed to be the next of kin, as a single class, on the other. It became necessary, of course, that a limited number of counsel should be elected to represent the two great parties to this issue, and an order of Court was made to that effect. Mr. Gilpin, who had been before retained by one of the parties, having in one aspect a minor interest, and in another an interest adverse to the rest, was chosen at a meeting of all the counsel, as one of the persons to try the cause for the next of kin. The selection was ratified by the Court. The effort of Mr. Gilpin in opening the case, evinced the highest degree of professional ability and research: it is scarcely too much to say that it gained the cause.

The gentlemen who were associated with him on the law side of the Court, having been originally retained by parties who were ultimately successful in the secondary contest in equity, have been compensated for their services. With Mr. Gilpin the case is different. Those whom he immediately represented, though victorious in the feigned issue like the rest of the next of kin, were defeated in the contest which followed, and have recovered a comparatively trifling amount. He has not felt himself authorized, under the circumstances, to accept compensation from his original clients alone, for the services which he rendered to them in common with all

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the rest, under the order of the Court and the appointment of their counsel.

The parties, against whom his claim would be sustained at law, as for services rendered at their "instance," or at least with their "consent,"* are numerous and scattered. Some of them have appeared before us by their counsel, to recognise the fitness and justice of the demand asserted for Mr. Gilpin: others, admitting its propriety in general terms, have questioned the manner in which it should be assessed among the several parties: others, again, are unrepresented, or decline consenting to its payment from the fund. Now, it is the familiar rule of Courts of equity, where a suit has been instituted and carried on for the benefit of many, that all who come in to avail themselves of the decree shall bear their just proportion of the charges. *Thompson* v. *Cooper*,† which was a creditor's suit against an administration; *Rogers* v. *Ross*,‡ which was a controversy like the present, growing out of the ambiguous language of a will: and *Mason* v. *Codwise*,§ where Chancellor Kent, by the terms of his decretal order, declared that he who comes in under the general decree, "is admitted upon the condition of being contributory to the plaintiff for his proportion of the expense of the suit."

* Balsbaugh v. Fraser, 7 Harris, 95.

† 2 Collyer, 90.

‡ 4 Johnson's Chancery, 608.

§ 6 Johnson's Chancery, 297, 301.

It appears to the Court, that if any case can occur, in which this rule should be enforced by holding the fund liable for the remuneration of the solicitor, it is this: where a gentleman has been chosen, by the concurrence of all the parties in interest before this Court, to render service for them all; that service to be rendered in a trial at law directed by this Court, and by counsel, who, by the further order of this

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Court, were to be specially assigned for its performance;—where the service has been rendered so ably, and with such important results to all;—and where, from the number, position, and relations of the parties, it has been from the first, and yet is impossible that they should unite in tendering to him a just honorary recompense. And it appears to us also, that where, from the character of the controversy, seven and a half per cent. has been esteemed by the parties themselves a fair compensation to the rest of the counsel who succeeded, the charge of three-quarters of one per cent. should not be deemed a more than adequate return for the successful labours of Mr. Gilpin.

DECREE ACCORDINGLY.

SMITH V. THE CREOLE AND THE SAMPSON.

[TOWING TUGS: STATUTES WITH PENALTY: PUBLIC PILOT: LIABILITY OF SHIPS FOR HIS NEGLIGENCE.]

Where a larger vessel—a ship—is in tow of a small one—a steam tug—the latter is in law regarded as the servant of the former; and being thus its agent, and so bound to obey its orders, is not responsible for damage in the proper course of the employment.

The Pennsylvania Pilot Act of 29th March, 1803, which "obliges" vessels going out of or coming into the port of Philadelphia to receive a pilot, under a "penalty," and "forfeiture" of half-pilotage, which the act makes a lien upon the ship, and recoverable in the Admiralty, is not compulsory, but is optional. The ship need not take a pilot, if it prefers to pay the penalty or forfeiture. Hence, there being a direct privity between the pilot and the ship, the latter is liable in Admiralty for damage caused by his acts.

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Statement.

AN act of Assembly of Pennsylvania, passed in 1803, provides for the selection of pilots by the wardens of the port, and for licensing the pilots so selected, after they shall have given bond with surety *in a sum not exceeding five hundred dollars, nor less than three hundred*, for the faithful performance of their duties. And one section declares that "every vessel (including, of course, *foreign* vessels), &c., shall be OBLIGED to receive a pilot—in the case of an inward bound vessel, the *pilot who shall first offer himself;* and in the case of one outward bound, it is enacted, that the master shall make known to the wardens the name of the pilot who is to conduct her (who, by understanding among the pilots, is always the same person who brings her up); and if he neglects to make such report, *he shall forfeit and pay the sum of sixty dollars;* and if the master shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel *shall forfeit and pay* to the wardens a sum equal to the half-pilotage of such

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vessel, to the use of the society for the relief of distressed and decayed pilots, their widows and children." By a supplement to this act, the "*penalties*" above recited are declared to be liens upon the vessel, and process, in the nature of admiralty process, is directed to issue from the State Courts to enforce their payment.* The act is a long and circumstantial one of thirty-seven sections, and under its provisions the port of Philadelphia has long been almost exclusively governed. It makes in short a complete and authoritative code of Port Warden Law.

* See Act of 29 March, 1803, §§ 17, 18, and 29, and Act of 24th February, 1820.

Its title is "To establish a Board of Wardens for the Port of Philadelphia, and for the regulation of Pilots and Pilotage, and for other purposes therein mentioned." It directs certain penalties, which it prescribes to be paid to the "Society for the relief of distressed and decayed Pilots, their widows and children." But it does not establish or regulate or in any other way refer to that society, which was one previously in existence. The Pennsylvania Act, unlike one or more of the English Pilot Acts hereafter mentioned, which, in effect, though not in terms, oblige or require masters to take pilots aboard, does *not* contain a clause exempting masters or owners for damage done through the neglect, default, incompetency, or incapacity of the pilot.

With this act in force, the Creole, a British ship, bound out and *in charge of a licensed pilot*, left one of the Philadelphia wharves, under tow of the steam tug Sampson, a small steamer of sixty horse power: and *in a very culpable manner, owing solely to the negligence of this pilot*, ran foul of the John Smith, which was quietly moored in a proper place on the

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opposite shore. The ship and tug were, of course, both under the pilot's command, *and there was no pretence that he was interfered with or disobeyed.* On a libel filed against both the steam tug and the ship, the District Court, from which the case came here by appeal, was of opinion that they were both exempted, from the fact that both were in charge of a *licensed pilot*, whom the Court considered had been compulsorily taken aboard.

In order to understand fully the arguments of Court and counsel, and the cases which they cited on appeal, it is necessary to refer to certain other pilot laws, both American and English. The Pennsylvania Act, on which this question arose, was passed, as has been said, in 1803. Congress, as early as August 7th, 1789, had enacted,* "that all pilots, &c., shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or *with such laws as the States may respectively hereafter enact* for the purpose, until further legislative provision shall be made by Congress." New Jersey, on the 8th February, 1837,† passed an act, which, though intended to establish and regulate pilots for certain ports not on the Delaware, provides for the case of a master of any vessel coming into *any of the waters of New Jersey*, who shall refuse to take on board a pilot, &c. And the State of Delaware has also a pilot law and system. These three States, it is known, are all bounded by Delaware river and bay. And an act of Congress, passed March 2d, 1837, enacts,‡ that it shall be lawful for the master of any vessel "coming into or going out of any port situate upon waters which are the boundary between two States, *to employ any pilot*

* § 30 of Act of August 7, 1789.

† Acts of 1837, p. 110.

‡ § 18.

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duly licensed or authorized by the laws of either of the States," &c.

The first English pilot act of importance appears to have been passed in 1716, 3d George I. ch. 13.* It recites the antiquity, usefulness, and skill of the fellowship known as the Pilots of Trinity House, and that persons not belonging to that fellowship, and incompetent, had lately interfered with their business, and lost or endangered many ships. It therefore forbids any person not belonging to that house to pilot ships under penalty of £10; saving, however, to all masters, &c., residing at Dover, Deal, or in the Isle of Thanet, the right to pilot their own vessels from any of those places; and it gives, always, to every master, "*the liberty to make choice of such pilot of the said society or fellowship as he shall think fit.*" The act declares that the number of pilots in the fellowship shall never be less than 120. It nowhere, in terms, '*requires*' or '*obliges*' the master to take a pilot; nor does it affix any forfeiture or 'penalty' for his not doing so, except so far as he may come within the designation of any person not belonging to that house, and may not come within the exception of a master residing at Dover, Deal, or in the Isle of Thanet. And it nowhere, in terms, *exempts an owner or master for damage done through the neglect default, incompetency, or incapacity of a pilot.*

* 5 Ruffhead, 88; id. 679, and 6 id. 481.

Passing by a subsequent act, that of 48th George III. A. D. 1808,† an important act in the history of English pilotage, but one not important in the statement of the case before us, we come to the act of 52d George III., passed in 1812.‡ It recites,‖ among other things, the wrecking of vessels and the loss of lives and property, from the ignorance and miscon-

† Ch. 104, 21 Ruffhead, 479.

‡ Ch. 39, 22 Ruffhead, 714.
‖ § 1.

duct of incompetent persons attempting to pilot; and recites further the antiquity and usefulness of the pilot societies of Trinity House; and then provides* for the appointment of a body of fit pilots, in connection with the Trinity House, their rates of pilotage and contributions to be made by themselves, to support their house. It enacts,† that no person but a regular pilot shall take charge of vessels, under a money "penalty," which the act prescribes; that‡ not less than eighteen pilots, in succession, without intermission or any unnecessary delay, shall by day and night constantly ply at sea, or be afloat to take charge of vessels, &c., whose approach is to be made known to them by signals, for the establishment of which the act provides; upon the making of which signals the pilots are forthwith to go off in time to fall in with such ships and vessels, "on pain of forfeiting, for the first offence, £20, for the second," &c. And the masters of ships§ coming towards land "*shall* display and keep flying the usual signal for a pilot to come on board;" and if a pilot is within hail or approaching, and the master does not facilitate his getting on board, and give the charge of piloting his ship or vessel to such pilot, he "shall forfeit and pay double the amount" of the pilotage charge. It then enacts,‖ *that no owner or master of any ship shall be answerable for any loss or damage, nor be prevented from recovering upon his insurance, for a loss occasioned by the neglect, default, incompetency, or incapacity of any regular pilot.* It saves¶ the right of any person to proceed by civil action against pilots or other persons; and provides** that nothing in the act shall "*affect or impair the jurisdiction of the Court of Admiralty.*"

* § 2. † § 6. ‡ § 10. § § 11. ‖ § 30. ¶ § 31. ** § 73.

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Finally came a pilot act, passed in 1825, 6th Geo. IV., quite a long and particular act, but containing, so far as we need refer to it, the same provisions as the act of 52 George III., already quoted. No one of these last acts, in terms, either '*requires*' or '*obliges*' the master to take a pilot.

The three last acts are sometimes severally called "The *General* Pilot Act." Relating, however, chiefly to vessels sailing on certain waters in the south of England, and not so obviously including vessels sailing on other rivers, the term is not clearly proper; and the extent of their application has been a matter of some diversity of opinion. These acts do not, in their terms, either embrace or exclude foreign vessels, but have generally been considered as not applying to them. Independently of these so called *general* pilot acts, are certain local pilot acts, proper to be mentioned.

* See 3 Price, 318.

I. *The Liverpool Pilot Act*, 37th George III.* That act places in the hands of a committee the power over pilots for the port of Liverpool; and after providing for their rates of remuneration for piloting ships into and out of that port, enacts, in one clause, "that the master of any vessel outward bound, who shall proceed to sea and shall refuse to take on board and employ a pilot, shall pay the full pilotage. A subsequent clause of the same act provides, "that if the owner, master, or commander shall require the attendance of a licensed pilot on board any ship or vessel, during her *riding at anchor*, such pilot shall attend such ship or vessel, and be paid for every day he shall attend, five shillings and no more." No clause of compulsion of any kind to have a pilot, nor any imposition of "penalty," is contained in this act.

This act, like the Pennsylvania act, and unlike the "general pilot act," contains *no* clause of exemption to master and owners for damage occasioned by the negligence, &c., of the pilot on board; nor exemption from defence by insurers, from the mere want of a pilot.

The Newcastle Pilot Act,* very much in this respect, *resembling the Pennsylvania statute*, and enacting that the owners or masters of any foreign ships, &c., coming into or departing from the said port of Newcastle, &c., 'shall and they are hereby *obliged and required*' to receive and employ a pilot licensed under the act; "and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, nevertheless, answer and pay to the said master, pilots and seamen, the aforesaid pilotage duties." This act, like the Pennsylvania and Liverpool acts in this respect, and *un*like the general Pilot Acts of 52nd George III. and 6th George IV., contains in terms no clause of exemption of liability to the master and owners, for damage occasioned by the negligence, &c., of the pilot on board.

* 41 George III., ch. 86, § 6; 1 Robinson, Jr., 108.

The case was argued by Mr. *G. M. Wharton* and Mr. *R. R. Smith*, for the libellant Smith: by Mr. *R. P. Kane*, for the ship Creole; and by Mr. *Sanderson*, for the steam tug, Sampson; the two questions in the case being,

1st. Whether, under any view, the steam tug being so small a vessel, was liable?

2nd. Whether, having taken a regularly licensed pilot aboard, excused the ship; the fault, confessedly, having been the pilot's alone.

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Argument.

For the towing tug.

For the towing-tug, the Sampson. It was said, that being so small a vessel—only about sixty-five horse power—and towing *a large foreign ship*, she was a mere servant of the ship, and that the case was quite different from the case of a large steamer towing small boats; in which last case, the smaller boat, which was often hitched on with several others, was necessarily in the custody and under the control of the large boat, who, with few or no orders to any of them, dragged them just where she pleased. And this view, though not admitted by the libellant, or by the owners of the ship, was not so strongly contested. The argument was principally on the 2nd point: on which it was argued,

For the libellant.

For the Libellant.—I. The language of this act we concede is strong. But the act itself has never been considered as obligatory. The reason probably is, that the right of State legislatures to act at all on this subject, may be questioned. The subject is intimately connected with the duty "to regulate commerce with foreign nations and among the several States." And this duty the Constitution of the United States gives to Congress. Whether to Congress exclusively, or not, is a matter which was long a subject of dispute, and is but just now settled.* New Jersey, which bounds the Delaware bay and river on the east, has a pilot law; so has the State of Delaware. Since 1837 the United States have a pilot law. "That the subject of pilotage in bays and rivers bounded by two States, is within the constitutional power of the federal government, cannot," says Judge Rogers,† "I think, admit of doubt." Un-

* Cooley v. Board of Wardens, 12 Howard, 299.

† 7 Pennsylvania State Reports, 311.

doubtedly the act of Congress will excuse a violation, in its favour, of any State act.

II. On general principles of law, the employment of a pilot under the Pennsylvania act, was not obligatory. "In relation to those laws," says Blackstone,* "which enjoin only positive duties, and forbid such things as are not *mala in se*, but *mala prohibita*, merely without any intermixture of moral guilt, annexing *a penalty to non-compliance*, here, I apprehend, conscience is no further concerned than by directing *a submission to the penalty*, in case of our breach of those laws. . . . . In these cases the alternative is offered to every man; 'Either abstain from this, or submit to such a penalty;' and his conscience is clear, whichever side of the alternative he thinks proper to adopt. . . . . These prohibitory laws do not make the transgression a moral offence or sin: the only obligation, in conscience, is to submit to the penalty, *if levied*." He quotes Bishop Sanderson, whose language† is "*Lex pure pœnalis obligat tantum ad pœnam, non item ad culpam.*"

* Commentaries, Introduction, § 2, p. 58.

† De Conscientiæ Obligatione, Prael. viii., §§ 17, 24.

III. This question is hardly open; for it is a question on a State enactment, judicially explained by the highest Court of the State itself. *Bussy* v. *Donaldson*‡ was decided by the Supreme Court of Pennsylvania in 1800, upon a pilot act similar in terms to the present one. Chief Justice Shippen then said: "The legislative regulations were not intended to alter, or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of a pilot; but to secure, in favour of every person (strangers as well as residents) trading

‡ 4 Dallas, 206.

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Argument. For the towing tug.

For the towing-tug, the Sampson ., skilful and honest being so small a vessel—only p' sels safe up the bay power—and towing *a large* ere right of choice, in- mere servant of the ship, ar nly, reason, why the law, different from the case aster liable for the acts of small boats; in which any cases, where the respon- which was often hitc' o exist, the servant may not, in necessarily in the e of the master. For instance, if of the large bo a merchant vessel dies on the voyage, to any of th comes captain; and the owner is liable pleased. Ar though the owner did not hire him, ori- the libella nor expressly choose him to succeed the cap- not so The reason is plain: he is in the actual ser- princir of the owner, placed there, as it were, by the argu of God. And so, in the case under considera- For the libellant. tion, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature. The general rule of law, then, entitles the plaintiff to recover; and we have heard of no authority, we can recollect none, that distinguishes the case of a pilot, from those numerous cases on which the general rule is founded."

This construction of the pilot law, after an acquiescence in it for forty-seven years, was again judicially established by the same Court in *Flanigen* v. *The Washington Insurance Company*.* "The act, it is true," say the Court, "in its terms seems to justify the position assumed; . . . . . but in the construction of this act, we must avoid laying too much stress on particular expressions. . . . . It is very evident from a glance at the act, connected with the knowledge we have of its history and subsequent legislation, there has been a conflict of interests between the

* 7 Pennsylvania State Reports, 306.

...hips and vessels employed in the foreign trade, and particularly the latter, on ...ne contending for, and the other ...pulsory employment of pilots in the ... these waters. This difference has re... a compromise. The legislature have wisely ... not to *compel* the owners to employ one, but ... permitted them, if they please, to compound, ...y paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their widows and children. The act sets out an inducement to avail themselves of their services, but does not compel them to do so. This construction of the act is reasonable and just. The legislature had two objects in view; the encouragement of that meritorious and patriotic class of men, by employment in their profession, and when that cannot be accomplished, by providing a fund, at the expense of the owners, for the support of themselves, their widows and families, when, either from age or disease, they may need assistance. It is just, as to the owners, whose interest it is to encourage a race of men surrounded by peril and hardship, and who contribute so much to the security of life and property, in the intricate navigation of our waters. But while this object is kept steadily in view, care has been taken not to throw too great a burden on the owners, which would certainly be the result of compelling them to employ a pilot, and of course pay full pilotage, even when the master of the vessel may have equal, if not greater skill, than those whom they may be obliged to employ; many of them being selected because of their intimate knowledge of the navigation."

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Argument. For the Libellant.

IV. It is hardly necessary to refer to English decisions on this point, but that of *Neptune the 2nd*, in the English admiralty,* is very strong. It was in November, 1814, two years and more after the act of 52 George III., containing the clause of exemption, but saving the rights of the admiralty, had passed. Sir William Scott says, "If the position could be maintained, that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. *But this, I conceive, is not the true rule of law.* The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount, as well as they can, against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owners."

* 1 Dodson's Admiralty, 467.

The case of the *Transit*, not reported, but referred to as decided by Sir John Nicholl,† seems to have been decided in the same way. And while Dr. Lushington, in cases which will be cited on the other side, has said that Sir William Scott did not know of the passage of the act of 52 George III., this would seem to be less probable than that, considering the jurisdiction of the *admiralty* undisturbed

† 1 Robinson, Jr., 50.

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Argument. For the Libellant.

by the act, he meant to decide that, notwithstanding the master was obliged, *so far as penalty obliged him*, to take a pilot; and admitting that the *clause of exemption* would release him and the owners in a common law Court, yet, as the act declared that nothing in it should affect or impair the jurisdiction of his Court, the *ship* was still liable in his Court. In other words, he meant to decide that it was the clause *of express exemption*, and not the mere penalty on *such* compulsory taking of a pilot, as a penalty made, which exonerated the vessel. This view of the act, in its effect on proceedings against *the ship*, is also taken by Sir J. Nicholl, in *The Girolamo*.* "The next clause indeed enacts," says this learned judge, "that nothing in this act is to deprive persons of any remedy or remedies upon any contract of insurance, or of *any other remedy whatsoever*, which they might have had if this act had not been passed, by reason or on account of the neglect, default, incompetency or incapacity of any pilot duly acting in charge of any ship:" and then comes the section, expressly saving the jurisdiction of the Court of Admiralty. If, then, all the former remedies are to remain, and if the jurisdiction of the Court of Admiralty is to be unimpaired, the remedy against the ship still exists, and masters and owners are only exonerated from personal responsibility. Before any of these acts passed, there can be no doubt that a pilot being on board, would not have exempted the owner from responsibility; what is then meant by "any other remedy or remedies whatsoever?" The remedy reserved, and the jurisdiction reserved, appear to me to mean, by the most just and fair construction, the remedy, *in rem*, in this Court, accord-

* 3 Haggard's Admiralty, p. 180.

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Argument.

For the Libellant.

ing to the existing rule of the maritime law of nations.

Now our act contains *no clause of exemption;* while its obligations to take a pilot on board, are really not so compulsory as those of the act of 52 George III., for this last contains a penalty of *double* pilotage, whereas ours contains a penalty of but *half* pilotage. And without considering what might be, or what have been the decisions of our State common law Courts, we have the decisions of Sir William Scott and Sir John Nicholl, in *The Neptune the 2nd* and in *The Girolamo*, sustaining the liability by remedy, so far as the vessel itself extends, in *this, a Court of Admiralty.*

* 5 Bosanquet, & Puller, 182.

Fletcher v. *Braddick*,* though not a case arising on the Pilot Acts, seems to declare a principle such as we seek to establish. There the defendants being owners of a ship, had chartered her—ship, master, mates and men—to the government, who put on board a commander in the navy and a king's pilot; and while under the orders of these, damage was done by a careless collision. But notwithstanding that charter party gave complete control of the ship to the government for the time being, and both master, mates and men were stipulated to be under the control of government, the Court held that with regard *to third* persons, the ship was to be considered as the ship of the owners; and that they were liable for the damage.

For the Ship, The Creole.

For the ship, The Creole.—The question is, whether it is the law or the ship owner which put the pilot on board?

I. The case is to be decided on the language of the

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Argument. For the Ship, The Creole.

act; and that language is to be construed by the rules of law—not by the understanding of ship owners. The State of Pennsylvania, governing by a system meant to comprehend the entire subject of navigation in the Delaware river and bay, '*obliges*' every vessel to receive a pilot; and affixes "a penalty," which it makes a lien, for the omission to do so, and gives to pilot's specific liens and remedies to enforce them. The right of the State to pass this law, is settled conclusively.* It was never a matter of any practical doubt: for Congress, as early as August, 7th, 1789, acknowledged and assisted the States in regulating this matter.

* Cooley v. Board of Wardens, 12 Howard, 300.

II. The subjection of the navigation to a public control, is a most important matter of State. The law meant—as public policy and necessity requires that it should mean—to prevent accidents from collision, in our long and intricate river and bay, by a general preventive police. The law commands. The party "*shall be obliged.*" A penalty is annexed, to be sure, and the argument is that the act thus provides an alternative. A statute may, indeed, be so worded, as to allow the party an option to do what it aims at, or to pay a penalty; to pay a tax, *e. g.*, at a certain day, or the tax and 10 per cent. at a day after. But this act is not so worded. It creates a duty, and punishes for the violation of it. Penalty is that which is rendered for wrong, and is not commutation or forced equivalent for acknowledged right. It implies, at least, in its general interpretation, the commission of some illegal act. The argument of the other side, "would prove every trespass to be matter of right, subject only to just responsibility."† A man might legally forge, rob or

† See the argu-

Ap'l Sessions, 1853.

Argument. For the Ship, The Creole. ment put with great force by Mr. Webster in reply to Lord Ashburton. Works, vol. vi. p. 337.

murder, if he would only surrender himself to be imprisoned or hanged. The doctrine mooted by Blackstone,* is not supported by the ethical writer, Bishop Sanderson, whom he quotes only in part. It is strongly and rightly dissented from by his able commentator, the present Mr. Justice Coleridge, of the C. B. He never, himself, meant to apply it, except to cases where the law is "*simply and purely* penal; where the thing forbidden or enjoined is *wholly* a matter of indifference," and where it can involve in it *no* degree of "public mischief or private injury."†

* Introduction, § 2, vol. 1, p. 58.

† Id.

"Perhaps," says Mr. Coleridge, "we shall find presently, when we consider the principle of obedience to the laws, that no matter can be purely indifferent, upon which the law acts by way of prohibition or command. But in the mean time the opinion seems a little inconsistent with other parts of the text, because it admits that a part of the law at least, (the penal part,) has a binding force on the conscience. To escape this, it is said that the law is to be understood as offering an alternative, and that the lawgiver did not intend the penalty as a punishment, but as a compensation. This is not very intelligible, when reduced to practice; compensation for what, and to whom?—some injury to some person or body is assumed in the very notion of compensation; and, in the case before us, that injury must flow from the breach of the law; so that the hypothesis is, that the legislature, seeing that a certain thing cannot be done without injury, deliberately agrees that it shall be done by any one, who will pay so much money for doing it; and it clothes

this agreement and permission in the form of a direct prohibition.

But even this explanation will not serve in the common case, in which, on default or inability of payment, the punishment is whipping or imprisonment; a fine paid to the king, the representative of the injured community, may be conceived to be compensation. But in the case now supposed, it must be said, that the legislature allows any man to do a given act, by the hypothesis injurious to the community, who will compensate it for that injury, by submitting quietly to be whipped.

Penalty, of whatever kind, is only another name for punishment; and punishment, as the author himself tells us, in vol. iv., p. 11, is not imposed for the sake of atonement or expiation, but as a precaution against future offences. The amount of the penalty may indicate the importance which the legislature attaches to the crime, and so indirectly the public inconvenience of the breach of the law; but it never can be looked upon as calculated to heal the wound occasioned by the breach.

Nor have the wisdom or importance of the law any thing to do with the principle of our obedience to it; the true principle of that is the authority of the lawgiver, which must be the same, whatever be the law. If we are convinced that the authority is sufficient, we ought to obey equally in great and small; nothing will discharge us but the opposition of a superior authority, which, in truth, renders the inferior insufficient. The same principle, upon which a breach of one commandment is declared to make a man guilty of the whole ten, applies to this case, and the more closely, the more trivial the matter may

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seem; for the smaller the inducement is upon which we break the commandment, the greater is the contempt of the authority.

Common sense and experience approve this reasoning, by showing that nothing is in fact indifferent when the law has once prohibited it. The breach of any one law must be inconvenient, either by way of example to other persons, or as diminishing the habit of respect for other laws, in ourselves. The laws of a country form an entire connected body, and though 'he that takes a little piece of iron from an iron forge, *may* do no great harm; yet if he takes it from a lock or a chain, he disorders the whole contexture."

The amount or character of the penalty can make no difference in the legal or moral obligation to obey the law. If the penalty had been imprisonment for a twelve month, would it be argued that the party might rightly disobey the law, if, on landing, he would go, without compulsion, to gaol?

III. The two cases cited in the State courts, are not obligatory here. Admitting that on a statute strictly local—a statute, e. g., relating to real estate, the decisions of the State Courts settle the construction for this Court—the case of such a State statute as this is very different. The act is essentially extra-territorial in its sphere of action. It is intimately connected with foreign subjects: so much connected with the 'regulation of commerce' between foreign nations, as to have caused great doubt whether the State had a right to pass such acts at all. It has been decided that they have. But it is indispensable that the construction of them remain to be settled by the federal Courts, in those cases where questions

arise in those Courts upon them. Independent of this, *Busey* v. *Donaldson* hardly has the weight of a well-considered judgment. Chief Justice Shippen expressly states, that it was a point of law "equally interesting for its novelty and its importance, *suddenly started*;" and one of a sort on which it was not 'agreeable to deliver an opinion,' as he did. *Flannigan* v. *The Washington Insurance Company* was a sharp attempt by demurrer, to deny a *statutory sea-worthiness:* no proof being given, of course, of the want of any sea-worthiness, in fact.

IV. In reviewing the English cases, it is necessary to advert to the dates of their decision, and to observe upon *what acts* they were decided.

Bowcher v. *Noidstrom*, 1st Taunton,* was in 1812, and under the act of 3d George I. That was a suit in trespass against the master of a Swedish ship, for damage done to another vessel, while the Swedish ship was in charge of a pilot, who "gave directions to one of the crew" to do an act which the Court considered improper to have been done, and which was the cause of the damage. The master now sued was on board at the time; but he was asleep in his bed and gave no orders throughout the whole transaction." Mansfield, C. J., who tried the case at Nisi Prius, being "of opinion that, although there was a pilot on board, the pilot does not represent the ship, and that the master was still answerable for every trespass," the jury found for the plaintiff. But on a rule *nisi*, in Banc, to set aside the verdict, and have a new trial, "*The Court* held that, as it did not appear that the captain had done any act in this case, the rule to enter a nonsuit must be made *absolute*."

* P. 568.

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Here then under a statute much less positive than our Pennsylvania statute, in requiring the master to take a pilot—a statute where the master had the liberty to make choice among 125 different pilots, which one he would have, and where there was no clause exempting *owners*—the master was held *not* liable. Certainly, the ground of this decision must have been that the vessel was properly in the hands of a legally appointed pilot, who, while on board, was the proper and exclusive person to give orders. The principle of the decision relieves the owner just as much as it can the master.

In the well considered case of *Attorney-General* v. *Case*,* in the Exchequer, in 1816, the owners of a vessel which damaged another ship lying at anchor in the river *Mersey*, and not proceeding on her voyage, by mismanagement of the helm while a pilot was aboard, was held liable. But why? "Because," says the syllabus, "the *Liverpool* local pilot act is not *compulsory* or *penal* on the captain to take a pilot on board *whilst lying at anchor*, but merely subjects him to the pilot's regulated allowance on refusal." It will be seen by reference (ante, p. 490) to the peculiar terms of that act, how very different it is from ours.

* 3 [Price, 302.

The counsel in the case just cited, who sought to charge the vessel, expressly distinguish the Liverpool act from the acts of George III., &c. "The Liverpool act," they say, "is not imperative . . . . there is no penalty in that act . . . . . as there is in the 52d George III. So that, if the master pleases, he may decline the services of a pilot on paying him his regular allowance; and the true reason of the indemnifying clause in the 52d

George III., is that the taking a pilot on board is *compulsory*."

Chief Baron Thomson, in giving the judgment of the Court, which adopting this view, held the vessel liable for the damage, distinguishes the Liverpool pilot act from the other, sometimes though improperly called the general pilot act; distinguishing them, not by adverting to the express clause of exemption in these latter, but by the fact that 'a penalty' is annexed to the omission to take a pilot. His language is,* "There is therefore no obligation imposed by the 37th Geo. III. "(i. e. the Liverpool act)" upon the master, to take any pilot whatever on board his vessel before she proceeds on her voyage; for the consequence of his refusing to take a pilot on board, on other occasions, is only a liability to pay the same wages as if he had taken such pilot on board. Now, if he was proceeding to sea, having taken such pilot on board, and if while the ship was duly and properly under the management of that pilot, an accident had happened, it might have been a fair question, whether the owner would then have been answerable; though there have been cases which show that, though a pilot may be on board, the master is in some instances deemed responsible, notwithstanding. But, I repeat, there is no such penal provision in this act of the *Liverpool* pilotage. By the 34th section of that act, indeed, it is provided, "that if the owner, master, or commander shall require the attendance of a licensed pilot on board any ship or vessel during her riding at anchor, &c., such pilot shall attend such ship or vessel, and be paid for every day he shall so attend, five shillings and no more. So that there is nothing here compulsory upon

* 3 Price, 321.

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the master or owner to take on board a pilot *while he is riding at anchor in this river Mersey.* It is optional in him whether he will do it or not; but if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His *obligation* to take a pilot is only on his proceeding to sea, and refusing to take on board a pilot so licensed. There is no penalty for not taking on board a pilot while lying in the river *Mersey;* but he is *enabled,* if he thinks fit (and not otherwise), to command the services of a pilot while so lying at anchor, paying for him at the rate here specified; and it is for that accommodation that he is to pay the five shillings, if he refuses to take the pilot on board. . . . . He was not compellable, at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was his own act to have him; and it can be only in the case of such an officer having been forced upon them and without his own election, that the responsibility of the owner can possibly be discharged."

* 1 Robinson, Jr., 95.

But the case of *The Maria,** which arose on the *Newcastle pilot act, and was most carefully considered by Dr. Lushington,* is in point. There can be no doubt that if the Pennsylvania statute IS compulsory, the owners are discharged. And the case of *The Maria* settles what language creates compulsion. The Newcastle act, unlike the general pilot act of 52d George III., &c., contained no clause of express exemption; but it "*obliged* and *required*" masters to receive, take on board, and employ a pilot. Neither did it prescribe any "penalty,' *eo nomine,* but enacted simply that, "in case of their neglect or refusal to

receive and employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the said master pilots the *pilotage duties*." It was in truth an act less strong than our State act. A collision having occurred while a pilot was aboard, the question *in Admiralty* was, whether that fact discharged the owners. And what says the Court? "Does the section in question impose any compulsory duty and necessity upon the owner or master to take a pilot on board? I am not clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken, without providing that, in case a pilot was not taken, the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanor. . . . . Look at the words of the act, 'obliged' and 'required,' they are compulsory *per se*. But is not the making the neglect to take a pilot punishable with payment of the pilotage *also*, a compulsion upon the owners. Suppose the statute had mentioned ten times the amount of pilotage. It would only be in the degree of compulsion, but not in the compulsion itself. . . . . The opinion I have thus formed in this case is founded on the general principles of reason and justice; that no one should be chargeable with the acts of another who is not an agent of his own election and choice. And I further think, that it would be contrary to all sense of equity, to say to the owners of a foreign vessel, "You shall take a pilot of *our* selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing."

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So, too, in *Carruthers* v. *Sydebotham*,* a suit on an insurance, though the Court of K. B. (differing herein from the Court of Exchequer, in *Attorney-General* v. *Case*†) held that the General Pilot Act *did* apply to the port of Liverpool, and therefore in the decision which they gave against the underwriter could have invoked the clause of express prohibition of a defence by the underwriter, when the loss arose from the pilot's act, yet the Court does not do so; but puts it on the fact that the terms of the general pilot act—terms less strong than in ours—are compulsory. Lord Ellenborough says: "If the master cannot navigate without a pilot, except under a penalty, is he not under *the compulsion of the law* to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands? . . . . . The consequence is, that there is no privity between them." Le Blanc, J., says: "It appears that the master was compellable by law to take on board a pilot;" and he afterwards refers to and relies on the express clause, "*independently of the general principle.*" Bayley, J., says: "This being a case where the master of the ship was bound at his peril to take a pilot on board, he cannot be identified with the pilot," &c.‡

* 4 Maule & Selwyn, 77.

† 3 Price, 302.

‡ And see McIntosh v. Slade, 6 Barnewall & Creswell, 657, 665.

The position we contend for is embraced in a principle of law stronger than it is necessary for us to contend for—a principle of law generally. Thus in *Milligan* v. *Wedge*,§ a butcher who had bought a bullock, employed a *licensed* drover to drive it home; none but *licensed* drovers being *allowed* to drive bullocks. The drover employed a boy to drive the animal, which did damage through the boy's careless

§ 12 Adolphus & Ellis, 737.

driving. Denman, C. J., says, "The party sued has not done the act complained of, but has employed another, who is *recognised by the law* as exercising a distinct calling. The butcher was not bound to drive the beast; he might not know how to drive it. He employs a drover, who employs a servant, who does the mischief. The drover therefore is liable, and not the owner of the beast. . . . . *So as to decisions upon the pilot acts:* when it is *not necessary* to employ a pilot, the master who has *voluntarily* employed one, is liable for his act." So Williams, J., "Where the person who does the injury *exercises an independent employment*, the party employing him is clearly not liable." And Coleridge, J., "I make no distinction between the *drover* and the *boy*. Suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation, therefore, of master and servant does not exist between them."

Now there is no English case which establishes a doctrine contrary to the one we seek to establish. That of *Neptune the Second*,* cited on the other side, in which Sir W. Scott uses language broad enough to comprehend contrary doctrine, was the case of a *foreign ship*, to which none of the English pilot laws apply, as was decided by Sir J. Nichol in *The Girolamo*.† The report contains no statement of the case nor any argument of counsel, while Sir W. Scott's opinion proceeds on the supposition that the reporter had done his duty, and given both. The grounds of his opinion—the antecedents upon which it was given—not appearing, an eminent judge‡ has been

* 1 Dodson, 467.

† 3 Haggard's Admiralty, 169.

‡ Dr. Lushington.

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forced to suppose that Sir W. Scott did not know of the act of 53 George III., passed a year before. Certainly it is impossible to believe that with an express exemption clause, he still held parties *subject to that act*, liable. But it is almost as impossible to believe that he did not know every thing important to any decision of his. The decision is perfectly explained by supposing that he was speaking only as to the case before him, the case of a foreign vessel: and that he gives *results* only of his argument without any exhibition of the process of mind, which in the case of *The Girolamo*, a foreign ship also, brought his successor, Sir J. Nicholl, to a similar conclusion.*

* 3 Haggard's Admiralty, 169.

After the case of *The Neptune the Second*, comes, in 1834, that of *The Girolamo*,† just mentioned, and also cited on the other side, in which the presence of a pilot was also held no discharge. This case, in truth, required no decision upon law. The Girolamo left the London docks with a pilot aboard, and went down the Thames as far as Blackwall, about which place a *thick fog* came on. The master, instead of interposing, as supreme over pilot and all on board, and stopping the vessel, "did not in the least interfere." The vessel went on, and when she got so much further down the river as to be below Woolwich, she ran afoul of another vessel and injured her. Sir J. Nicholl says in this part of the case:‡ "But again, did the accident arise from the 'neglect, default, incompetency, or incapacity' of the pilot? or was the master *in pari delicto?* It occurred from the vessel going on in the fog, not from any act of bad steerage, want of knowledge of shoals, or any incapacity as pilot; but from proceeding at all. . . . . .

† Ib.

‡ P. 176.

Had he (the master) not a right to resume his authority? Did he not owe it to his owners and to other persons, whose property might be damaged by a collision, to insist on bringing the vessel up? If he was in as much haste to get out of port, as the pilot was to finish his job, are they not in *pari delicto?* Was not the master in duty bound, at least, to remonstrate with the pilot, and to represent the danger of proceeding? . . . . . Is the master, or are the owners relieved from all sorts of responsibility, however gross and manifest the misconduct of the pilot may be, whilst the master remains a passive looker-on, without taking any step to guard against damage?" The Court, however, put the case on other ground, st., that of the *foreign* character of the ship, which, as a *foreign* ship, was not meant to be included in the British Act: and declares, that as by the laws of Austria, a British vessel would be held liable in similar circumstances, no law of national reciprocity could control the Court in applying the *general* rule of law that the owners are responsible.

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Fletcher v. *Braddick*,* cited on the other side, has confessedly nothing to do with the Pilot Acts; nor with the principle of exemption which they give. There the defendants had chartered their ship to the government. The commander of the navy, by whom the bad orders were given, was placed in the situation and power to give them, by the voluntary act of the defendants: and so having voluntarily enabled others to do the injury, they could not themselves plead exemption.

* 5 Bosanquet & Puller, 182.

Grier, J. When canal boats, or other like ves-

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sels, are towed by steamboats, it is usually under a contract, which puts the towed vessel wholly under the direction and control of the officers of the steamboat. In such cases the steamboat would be liable for any collision occasioned by the negligence or want of skill of her officers. But when the steam power has been hired to tow larger vessels in or out of port, the contract is different, and creates a different state of responsibility. The tow-boat in such cases is the servant of the ship, and in the exercise of its physical power is bound to obey the orders of the master or pilot who has command or control of the ship. If the tow-boat obeys the directions of the pilot or master of the vessel, he is responsible for the consequences. If the ship is brought into collision with another vessel, by the unskilfulness or disobedience of orders of the officers or hands on the tow-boat, its owners are liable to the owners of the vessel or person who employed them, but not to third parties. Their recourse is to the master and not the servant, unless in case of malicious or wilful injury. It is only necessary to refer to *The Duke of Sussex*, *Duke of Manchester*, and *The Gipsey King*.*

* 1 W. Robinson, 270; 2 id. 478; id. 537.

2nd. The position assumed in behalf of the *ship*, and by which it is sought to cast the responsibility on the immediate cause of it—the pilot—raises a question of vast importance in its bearing on our bay and river navigation. In most, if not all the ports of the United States, the laws for licensing and regulating pilots, are enacted by the different States in which the ports are situated. And however variant they may be in their details, they generally require a vessel entering or leaving a port, to employ a licensed pilot. The persons licensed are seldom of

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sufficient property to respond in damages for their acts of negligence, nor are they required to give security to a sufficient amount to meet such responsibility. If the colliding vessel be discharged from liability, while under the direction of a licensed pilot, and recourse for the injury can be had against the pilot alone, the injured party will, in most cases, be wholly without remedy.

It is a violent presumption against the validity of this defence, that in the numerous cases of collision daily occurring in the United States, in many or most of which, no doubt, the vessels have been under the control of licensed pilots, the owners have not endeavoured to avail themselves of it. Nor has the learned counsel for the respondent, with all his research, brought to my notice a single case in the common law or admiralty Courts of the United States, where this defence has been held available. On the contrary, in the case of *Bussy* v. *Donaldson*,* in the Supreme Court of Pennsylvania, when this defence was set up, it was not sustained, and Chief Justice Shippen, speaking in 1800, of the Pilot Law of Pennsylvania—an earlier law than the one now in force, but in this particular section the same as the present one—says, "The legislative regulations were not intended to alter or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of a pilot; but to secure, in favour of every person (strangers as well as residents) trading to our ports, a class of experienced, skilful and honest mariners, to navigate their vessels safe up the bay and river Delaware. The mere right of choice, indeed, is one, but not the only, reason why the law in general makes the master lia-

* 4 Dallas, 206

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ble for the acts of his servant: and in many cases, where the responsibility is allowed to exist, the servant may not in fact be the choice of the master. For instance, if the captain of a merchant vessel dies on the voyage, the mate becomes captain, and the owner is liable for his acts, though the owner did not hire him originally, or choose him to succeed the captain. The reason is plain: he is in the actual service of the owner, placed there, as it were, by the act of God. And so in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature."

The doctrine that the owners are not liable for a collision by their vessel when under the control of a licensed pilot, was first introduced in England by the Pilot Act of 52 Geo. III. c. 39, passed in 1812. Previous pilot laws, although they required every vessel to take on board such a pilot under penalties, did not discharge the owners from liability for their negligence. It appears by the case of *Bowcher* v. *Noidstrom*,* which was decided before Chief Justice Mansfield in 1809, that this notion that a licensed pilot was not considered a servant or agent of the owner, had obtained no place in Courts of justice; for the Chief Justice held the *master* liable, on the assumption that he represented the ship or owners; and the case was reversed, not because his legal position was incorrect—to wit, that the ship or owners would have been liable for the act of either master or pilot, as their servant; but because one servant was not liable for the act of another, who was not his subordinate. The case of *Fletcher* v. *Braddick*,† though not directly in point, seems not to recognise

* 1 Taunton, 568.

† 5 Bosanquet & Puller, 182.

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the same principle. In cases of collision, the injured party has a remedy by action at common law, not only against the owners, but the master. And although the master of the vessel is the servant of the owners, and they are liable for his acts in the course of his employment, he is an exception to the general rule, that the remedy of third persons for the servant's acts of negligence is only against the master. As the pilot, when on board, has the absolute and exclusive control of the ship, *the master* might well defend himself against liability for the acts of one over whom he has no control or authority. Therefore by the maritime law *the master* is not held liable for the acts of mariners, who are not of his own choosing, and who are not acting under his orders.* The pilot is for the time master of the vessel, and substituted in the place of the captain, with the same duties and responsibilities. But it is far from being so clear as a principle, either of maritime or common law, that the *vessel or the owners* are discharged from responsibility for the same reason.

* Molloy, Bk. II., c. 3, § 12.

Pilot laws are intended not to burthen commerce, but for its benefit and safety. As a general rule, masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast, nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent, the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant, but are not in a situation to test or judge of his qualifications, and have not therefore the information necessary to choice. The pilot laws kindly interfere, and do that for the owners which

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ble for the acts of his servant: an persons where the responsibility is allow to give vant may not in fact be the ir duties; For instance, if the captain cases, that on the voyage, the mate ich pilot se- owner is liable for his ac should contri- hire him originally, c stituted for their captain. The reaso is supposed to annul service of the own vant between pilot and act of God. An than real. It has its ori- the pilot was oal criticism of the language the ship, the an on fact. The Pennsylvania dent act of ue, "obliges" a pilot to be taken on

The d the *penalty* of paying half pilotage. collisio s often been said, there is no magic in licens For after all, it amounts only to this: That Pilo s which do not find it necessary to avail themvi es of the services of pilots provided for them by the law, may be piloted by the master or other person, if they prefer it; but in such case they will be required to pay a small tax, equal to half pilotage, for the benefit of the wives and children of those whose lives are daily exposed to peril and hardship, for the purpose of tendering their services, if needed. The assessment of a tax for the support of a system so beneficial to ship owners, where the services are declined is no compulsion, and calling it a penalty, will not alter the case. The vessel when under the control of a pilot, is in the legal possession of the owners. The pilot is their servant, acting in their employ, and receiving wages for services rendered to them. The fact that he was selected for them by persons more capable of judging of his qualifications,

* 1 Taun' 568.

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cannot alter the relation which he bears to the owners. He is still their servant.

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The Court of Exchequer in the case of *The Attorney General* v. *Case*,* confirm what I have said, that before the pilot act of 52 Geo. III., (1812,) the owner was held liable for the act of the pilot as his servant. They decided also, that the Liverpool pilot act was not compulsory or penal, though it required the vessel to pay the pilot's wages, whether it employed him or not. In the case before us the master may decline the services of the pilot, by paying half his wages. I am well aware that Dr. Lushington, in the case of *The Maria*,† which arose on the Newcastle Pilot Act, has given a different construction to the Liverpool Pilot Act, because it uses the words "*oblige and require.*"

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* 3 Price, 302.

† 1 W. Robinson, 95.

The English cases on this subject, since 1812, cannot be reconciled with one another, and have not been adopted as precedents here. On the contrary, the case of *Bussy* v. *Donaldson*, in which I have quoted the opinion given by Chief Justice Shippen, has been adopted as founded on the sounder reasoning.‡ And in 1847, quite independently of that precedent, and without the least reference to it, the Supreme Court of Pennsylvania again interprets the statute before us in the same way as he did the one before him, in this respect, exactly like it.§

‡ See Yates v. Brown, 8 Pickering, 23; Williamson v. Price, 16 Martin, 399; 3 Kent's Commentaries, 175, 6.

§ Flanigen v. The Washington Insurance Company, 7 Barr, 312.

They say: "The legislature have wisely decided not to *compel* the owners to employ a licensed pilot, but have permitted them, if they please, to compound by paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their widows and children. This act sets out an inducement to avail themselves of

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their services, but does not compel them to do so. This construction of the act is reasonable and just."

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Thus far I have considered the question on the principles peculiar to the *common or civil law* relating to master and servant, rather than those of the *maritime* law. The proceeding in this case is *in rem*, for a maritime tort. The rights and remedies of the libellants are to be tested by the principles of that law, unaffected by any statutory provisions. A proceeding *in rem*, in admiralty, is not a mere attachment to compel the appearance of the owners, as in civil law proceedings, and attachments under the custom of London, which are not proceedings *in rem* in the admiralty sense of the phrase. The Court of Admiralty proceeds on the principle that the vessel itself is hypothecated by the contracts, as well as the obligations arising *ex delicto* of the master, and is herself liable for all maritime liens. The owners and others interested, are allowed to intervene *pro interesse suo;* and for convenience of trade and commerce, are *permitted* to release the vessel, by substituting their stipulation and security in its place. But the property attached is, in all cases, treated as the debtor, and primarily liable.

By the maritime law, the power of the master to bind the owners by his obligations *ex delicto*, did not extend beyond the tacit hypothecation of the property in his possession. By surrendering the hypothecated vessel, the owners escape further liability, or if they intervene, cannot be made liable beyond her value.

These principles which prescribe the powers of the master of a vessel, are not drawn from the doctrine

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of the civil law concerning the relation of master and servant, but had their origin in the maritime usages of the middle ages. By these the ship was bound to the merchandise and the merchandise to the ship; and both are bound for the mariners' wages, "even to the last nail of the ship." By these the master was authorized to bind the vessel by bottomry. And by these the vessel becomes hypothecated for the obligations of the master arising *ex delicto*, and is herself treated as the debtor or offender. Hence, also, the vessel became bound to those who dealt with the master, whether he was appointed to act as their agent, or the ship was let to him on charter-party. It is unnecessary to make an array of the various European writers on this subject, as authority for these statements: I refer for them to the opinions of Judge Ware, in the cases of *The Spartan*, *The Rebecca*, and *The Phebe*,* in which the origin and principles of maritime law affecting the liability of vessels for the contracts of the master, are treated with the ability and research which distinguished that judge.

*Ware, 138, 188, 263, &c.

It would seem to follow from these principles, that third persons, who may be supposed to be ignorant of the owners, have a right to treat the vessel as primarily liable, *ex delicto*, for the acts of the owner, who has the legal possession and control of her movements. The pilot is the master for the time being—as such, also, he is legally in possession, acting for the owners and in their services. The law which hypothecates the vessel for negligent or wrongful acts of her commander, does not stop to inquire as to the mode of his appointment, or the motives or degree of consent which accompanied it.

Ap'l Sessions, 1853.

The Court's Opinion.

2nd Point. Liability of the Ship.

* 1 Dodson, 467.

† 1 W. Robinson, 49.

It is in accordance with these principles that the case of *The Neptune the Second** was decided by Sir W. Scott, in 1814, two years after the passage of the Pilot Act of 52 Geo. III., already referred to. It is supposed by Dr. Lushington,† that the learned Judge overlooked the provisions of that statute; but as a true statement of the maritime law unaffected by statute regulations, it has never been impugned. In that case the pilot was wholly in fault, and it was objected that the vessel and the owners were not liable for the damages occasioned by the collision. But Sir W. Scott asserted the law to be, "That the parties who suffer are entitled to have their *remedy against the vessel that occasioned the damage*, and are not under the necessity of looking to the pilot for compensation. It cannot be maintained that the circumstance of having a pilot on board, and acting in conformity with his directions, can operate as a discharge of the responsibility of the owners."

I am authorised to say that the point of law now before us, has been decided by my brother Wayne, in the District of South Carolina, in the same way as I now determine it.

JUDGMENT REVERSED.

[COMMON LAW DOCKET, NO. 6, APRIL SESSIONS, 1852.]

EX PARTE JENKINS ET AL.

THREE CASES.

[HABEAS CORPUS: FEDERAL AND STATE JURISDICTION.]

[COUNSEL.]

On a habeas corpus, in a question of conflict between State and Federal process, counsel have no right to appear in defence of the State process, unless in some way authorized by the State or its proper officers; and, after return made, the Court refused to hear as counsel a member of the bar, who showed no such authority; nor any authority beyond that of the person executing the State writ.

The Court may issue a habeas corpus to bring before it one of its deputy Marshals, arrested and put in gaol under State process—whether of a justice of the peace or of the Court, or Supreme Court,—whether criminal or civil—for his conduct in executing a writ issued under the Fugitive Slave Law; may inquire into the cause of commitment, and, if illegal, order a complete discharge. And in the case of an arrest, on State process, of an officer of the United States, for an alleged abuse of his powers, this Court will not only hear evidence to disprove the truth of the affidavits upon which the State authorities proceeded, but will, independently of such proof, consider those affidavits; and if, in the judgment of this Court, those affidavits do not contain a *prima facie* ground for arrest, will discharge the federal officer, without hearing any counter-evidence. As a general thing, moreover, in the case of such an officer the Court will discharge him unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others, to supply its place.

If an officer of the United States has been arrested to answer an indictment found by a State Court, for riot, assault and battery, and assault with attempt to kill, the indictment not showing that the alleged offences were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or Court thereof, this Court, on a habeas corpus, where the petition of the officer denies the offence, and avers that what is alleged as offence was done in proper execution of an order, process, or decree of a federal Court, will go outside the indictment, and hear evidence to show the truth of the facts set forth by the officer.

O&T SESSIONS, 1853.

STATEMENT.

JENKINS, Wynkoop, Crossin, and Keith, Deputy-Marshals of the United States, in executing, in Luzerne County, Pennsylvania, a warrant regularly issued from this court, to arrest one William Thomas, a negro boy, as "a fugitive from labour," had been obliged to have a violent and bloody encounter with

Oc'R SESSIONS, 1853.

STATEMENT.

him, in which the negro, being encouraged by certain people in the neighbourhood, proved successful and escaped to the country. Though the negro was roughly handled, it did not appear that the officers had proceeded with more force than was necessary to take him, nor, indeed, as the event showed, with as much.

One Gildersleeve, being informed by somebody who had seen the struggle, and had taken part with the negro, that a white man had shot a negro and was going to kill him, was induced to go before *a county Justice of the Peace*, and swear to the facts necessary to procure a warrant as for an assault and battery, with intent to kill. Such a warrant was accordingly issued in due form by the justice, and delivered to the *constable of the borough*, who, in pursuance of it, arrested the Deputy-Marshals and put them in gaol.

On a petition from the prisoners setting out the facts, a Habeas Corpus from this Court was applied for to bring them up: whereupon Mr. *David Paul Brown* appeared and objected to any action by the Court in the case; but he did not make known for whom he thus appeared and objected.

The Court, desirous to hear any objection from any source which could be made as to the extent of its power in so delicate a matter, allowed Mr. Brown to speak as *Amicus Curiæ*, without any formal inquiry as to who had authorized him to appear: and under this permission he quoted the Judiciary Act of the United States,* which, while it gave this Court "power to grant writs of *Habeas Corpus* for the purpose of an inquiry into the cause of commitment," *provides* that they "shall in no case extend to *pri-*

* Act of 24th September, 1789, § 14.

soners in gaol, unless where they are in custody under or by colour of the authority of *the United States*, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify." And he endeavoured to satisfy the Court that, as confessedly, the warrant of commitment would show that the deputy was a prisoner in gaol under legal process from *the State* magistrate, it was useless to proceed; the return to the warrant being conclusive evidence of the fact and source of commitment.

The writ of Habeas Corpus having been granted, notwithstanding, and the constable having subsequently made a return to it as above indicated, Mr. Brown, after reading for him the return, was going on to argue as counsel against the discharge; but, being then called upon by the Court to state for whom he appeared, said that he appeared for *the constable*. The Court informed him that he had already performed his duty to his client in making that officer's return to the Habeas Corpus which had issued; and if he had authority from no other source, he could not be further heard as counsel in the matter; but informed him also, as previously on the application for the writ, it had announced very publicly from the Bench, that if he or any other gentleman of the bar appeared by authority from the Governor, or Attorney-General of Pennsylvania, or from the Attorney-General's Deputy for Luzerne, the Court would be most desirous and happy to hear him as counsel for the Commonwealth, who, in support of its own process, was the party to avow the proceeding and to appear and defend it. But as the Court had as yet no reason to believe that any of those officers had shown any countenance to such proceed-

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ings, and as the negro who had a right to complain as the injured party (if any one had) had confessed the justice of his arrest by fleeing to the country, it would not permit mere volunteers to interfere for the purpose of embroiling the State of Pennsylvania against her will, with the United States, nor permit that any association, however respectable some of its members might be in private life, should assume to be the guardians of *her* peace and dignity. Mr. Brown not having any such authority, but being in fact, it was supposed, employed by certain societies in Philadelphia, known as "Friends of Humanity," "Abolitionists," &c., was not permitted to speak. The State of Pennsylvania did not by any of its officers give notice of any wish to be heard. Mr. *Ashmead*, the District Attorney of the *United States*, appeared for the United States, claiming the discharge of the Deputy Marshal. Mr. Ashmead stated that the writ had not, as Mr. Brown supposed, been applied for nor granted under the old and general powers given by what is called the Judiciary Act of the United States; but under a wholly different act of later date,* a memorable and transcendent act—part of which, in its creation at a crisis interesting to the nation, was made but temporary; but of which one section was left perpetual, in view of exigencies like the present. That section enacts, "That either of the justices of the Supreme Court, or a judge of any District Court of the United States, *in addition to the authority already conferred by law*, shall have power to grant writs of *Habeas Corpus* in all cases of a prisoner or prisoners in gaol or confinement, where he or they shall be committed or confined on or by any authority of law for any act done or omitted to

* Act of March 2, 1833, ch. 57, § 7, "Further to provide for the Collection of Duties on Imports."

Oc'r Sessions, 1853.

be done in pursuance of a law of the United States, or any order, process or decree of any judge or Court thereof; *anything in any act of Congress to the contrary notwithstanding.*"

The Court's Opinion. October 15th.

Grier, J.—The jurisdiction of the Courts of the United States is limited, but within its limits supreme. The State Courts have often in many cases, a concurrent jurisdiction over the same subjects and persons. But neither can treat the other as an inferior jurisdiction, except in the cases where the Constitution and acts of Congress have given such power to the Courts of the Union. Where persons or property are liable to seizure or arrest by the process of both, that which first attached should have the preference. Any attempt of either to take them from the legal custody of the officers of the other, would be an unjustifiable exercise of its power, and lead to most deplorable consequences. Therefore, if a person be imprisoned under the civil or criminal proofs of one, the other cannot take him from such custody in order to subject him to punishment for an offence against them. A fugitive cannot be taken from the legal custody of the Sheriff by any warrant from the Courts of the United States, in order to extradition, under the acts of Congress. Neither can such fugitive, when in custody of the Marshal, under legal process from a judge or commissioner of the United States, be delivered from such custody by means of a habeas corpus or any other proofs, to answer for an offence against the State, whether felony or misdemeanor, or for any other purpose.

While the Act of Congress does not forbid the issuing of a habeas corpus by a State Judge, it care-

Oct'r Sessions, 1853.

The Court's Opinion.

fully guards against the abuse of it, and makes a certificate of a commissioner or judge of the United States, "conclusive evidence of the right of the person or persons in whose favour it is granted, to remove such fugitive;" and forbids "all molestation of such person or persons by any process issued by any Court, judge, magistrate, or other person whomsoever." This Act of Congress is the supreme law of the land, and binding on the conscience of State judges as well as those of the United States. Judges of the United States, as well as of State Courts, are therefore bound to dismiss a writ of habeas corpus, or to refuse to allow it whenever they are properly informed that the prisoner is held by legal process under this act, and not to suffer it to be abused by mischievous intermeddlers for the purpose of "molestation" of the officer or owner of the fugitive in effecting his extradition.

The laws of the United States give ample remedy by habeas corpus for those illegally imprisoned under colour of their process—and State Courts have in many instances exercised a concurrent jurisdiction in similar cases. But State Courts or judges have no power under a habeas corpus to review or sit in error upon the judgments or process of the judicial officers of the United States acting within the jurisdiction committed to them, as has sometimes been done.

Passing, however, from these observations of a general kind to the principles which apply to the case immediately before us.

The counsel whom we heard as *Amicus Curiæ*, suggested to us—quoting the Judiciary Act of 24th of September, 1789,* as his argument—that the

* § 14.

Oc'n Sessions, 1853.

The Court's Opinion.

Court had no power to discharge the prisoner, because he was held by a warrant from *the State magistrate* for an alleged criminal offence against *the State of Pennsylvania;* and that the warrant was conclusive evidence of the fact. To a habeas corpus issued by this Court under the authority conferred on them by the Judiciary Act, this objection would be conclusive. But this writ was not allowed and issued under the general law, but as the District-Attorney of the United States has stated, under special powers conferred by the Act of Congress of 2nd March, 1833,* which, so far as material to our present inquiry, is as follows:

* Ch. 57, § 7.

"And be it further enacted, that either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in *all* cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined *on, or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States,* or any order, process or decree of any judge or Court thereof, any thing in any act of Congress to the contrary notwithstanding."

The petition states, and the proof shows, that the prisoner has been committed for an act done in executing process issued in pursuance of a law of the United States. It therefore comes within the provisions of this act.

What then have we power to do on the return of the writ?

"The writ of habeas corpus is a high prerogative writ known to the common law: the great object of

Oc'r Sessions, 1853.

The Court's Opinion.

which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment; it brings the body of the prisoner up, together with the cause of his commitment. The Court can, undoubtedly, inquire into the sufficiency of that cause."*

* Ex parte Watkins, 3 Peters, 201.

A warrant of arrest issued by a justice of the peace has none of the characteristics of a judgment of a Court of record, and is therefore not conclusive evidence that the prisoner is rightly deprived of his liberty. It is every day's practice to inquire into its regularity, and whether it has been issued on sufficient grounds to justify the arrest and imprisonment. If this could not be done, the writ of habeas corpus would little deserve the eulogies which it has received as a protection to the liberty of the citizen.

Warrants of arrest issued on the application of private informers, may show on their face a *primâ facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present, A. tells B. that he has seen C. kill D. B. runs off to a justice, swears to the murder boldly, without any knowledge of the fact, and takes out a warrant for C., who is arrested and imprisoned in consequence thereof. C. prays a habeas corpus, and shows that he was the sheriff of the county, and hanged D. in pursuance of a legal warrant. If a Court could not discharge a prisoner in such a case, because the warrant was regular on its face, the writ of habeas corpus is of little use. Every arrest of the person is an assault and battery, and attended with force and violence against a resisting party; and if

made by three or more persons is a riot, provided the fact be concealed that it was made in execution of a legal warrant.

The authority conferred on the judges of the United States by this act of Congress, gives them all the power that any other Court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned "*by any authority*," for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him? This act was passed when a certain State of this Union had threatened to nullify acts of Congress, and to treat those as criminals, who should attempt to execute them; and it was intended as a remedy against such State legislation. If the State of Pennsylvania had, by act of legislature, declared that the fugitive law should not be executed within her borders, and had directed her officers to arrest and imprison those of the United States who should attempt to execute it, would not this Court have been bound to treat such act as unconstitutional and void, and discharge their officers from imprisonment under it? And have they no power to do so, when intermeddlers endeavour to abuse State process for the same purpose? If the marshal and his officers may be arrested for serving process, why not the commissioner and judge who issued the process? The extreme advocate of State rights would scarcely contend that in such cases the Courts of the United States should be wholly unable to protect themselves or their officers.

Oc'r Sessions, 1853.

THE COURT'S OPINION.

Let us look at the consequences. While the marshal's officer in this case is endeavouring to take the prisoner, a person swears to the information on which this warrant was issued, and puts it, we will suppose, into the hands of the sheriff, knowing the person charged to be acting under authority of the laws of the United States. Now, let us suppose the marshal's officers had succeeded in making the arrest, and the sheriff had attempted to execute process, what would have been the consequence? If the marshal resists, a contest ensues, which may be called, in fact, a war between officers, each acting and justifying his conduct under proof from his particular sovereign. If the sheriff succeeds, the fugitive is discharged, and the officer of the United States conveyed to prison. If such a state of affairs can be brought about at the instance of any person, who is willing to swear without scruple to that which he does not know to be true, or perhaps knows to be false; then, indeed, has been discovered a safe mode of nullifying the constitution and laws of the United States.

In conclusion, as we find that the prisoners are officers of the United States, in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same; that they have not exceeded the exigency of the process under which they acted; that this prosecution has not been instituted, nor is now acknowledged by the State of Pennsylvania, but has its origin in some association living at a distance, and ignorant of the transaction which they have volunteered to investigate; that the information on which the warrant to arrest the prisoner is founded, was sworn to by one who did not

know whether the matter of the affidavit was true or false, and that by stating but half the truth, it is wholly false. Therefore the order of the Court is, that the prisoner be discharged.

Oc'r Sessions 1853.

The Second Case.

Some time after the prisoners were thus discharged, the negro, Thomas, brought a civil suit in the *Supreme Court of Pennsylvania* against Jenkins, Wynkoop, Crossin and Keith, the same deputy marshals. The negro, himself, filed no affidavit of his cause of action, but there were two affidavits filed by other persons. They showed, that on the day of the attempted arrest of the fugitive, Thomas, he came out from a hotel in Wilkesbarre, wounded, bleeding and faint—that he was pursued—that there was a cry of 'shoot him,' and the sound of pistol shots—that he made his way to the river, and plunged in, declaring "that he would never be taken,"—that he subsequently came out, but was driven back again to the water's edge, by a presented pistol—that there were many persons on the river bank, some of whom were menacing, and some who are spoken of as the "pursuers" and "the officers;" that among the persons on the bank were three, of whom one witness says he "saw two in the Court room—one was Wynkoop, and the other, a big man," he thinks "Crossin,"—and that "soon after the return of the officers to the hotel," the fugitive having gone away in the meanwhile, unrestrained, a colloquy of an excited character took place between two gentlemen at the hotel, in which one of them announced himself as "Judge

Statement. Of 2d Case.

Oc'r Sessions, 1853.

Statement. Of 2d Case.

Collins," and the other as "John Jenkins, U. S. deputy-marshal." Nothing, whatever, was said in them about *Keith*, the fourth party now arrested. However, on these affidavits, a judge of the Supreme Court of Pennsylvania allowed a *capias ad respondendum* in trespass, *vi et armis*, and with bail in the sum of $5000 specially allowed, to issue, and under this writ, all four officers were arrested by the sheriff of Philadelphia county, and not giving bail, committed to prison. In a suit of the United States, at their relation, against Allen, the sheriff, they now presented their petition for a habeas corpus, setting forth that they were deputy marshals of the United States; that as such, they were charged by a writ duly issued by a Commissioner of this Court, and indorsed in proper form, with the duty of arresting Thomas, as a fugitive from labour; that having found him, they sought to arrest him, but by great violence were prevented from doing so—setting forth the fact of the *capias ad respondendum*, &c., and averring that all their acts and doings were done by them as officers of the United States, in pursuance of a law of the United States, and of process issued by a Court thereof. The relators having made out a *primâ facie* case in accordance with their petition, Thomas's counsel presented the affidavits on which the judge of the Supreme Court had ordered them to be held to bail. The relators then offered evidence in rebuttal, to which the other side objected, on the ground that the case must rest upon the facts which were before the State judge, when he fixed the bail.

After argument on both sides, the opinion of the

Court, (GRIER, J. being absent,) was delivered in substance as follows, by

O&T'R SESSIONS, 1853.

KANE, J.—The seventh section of the Act of Congress of March 2nd, 1833, chapter 57, under which the action of the Court in the present instance is to be regulated, enacts, "That either of the justices of the Supreme Court or a judge of the District Court, shall have power to grant writs of habeas corpus in all cases of prisoners in confinement, where they shall be confined by any authority of law for any act done in pursuance of a law of the United States, or any process of a judge or Court thereof."

THE COURT'S OPINION. 2d Case. February 9.

I will not weaken, by a repetition, that clear and conclusive exposition of this section, given by Judge Grier, when this case was before us on the arrest, at the suit of the commonwealth, for the assault and battery with intent to kill. But to say that we may issue a habeas corpus to rescue an officer from imprisonment for doing his duty, and yet that we shall shut our eyes to the proofs that he did it—to affirm that a Court, called on to inquire whether an imprisonment is tortious, must listen to no evidence but that of the tort feasor himself and his accomplices—to protest that wrong is to be done by truth pertinent to the issue—is to invert the first principles of common sense as well as justice.

What is that issue? Is it whether the learned judge of the Supreme Court of Pennsylvania had authority to issue this writ: or whether this writ itself is formal? No one has contested either of these positions. Is it whether he has exercised his functions properly? It is no part of my functions to revise his adjudications; he has his own sphere,

Oc'r Sessions, 1853.

THE COURT'S OPINION. 2d Case.

and I do not share its responsibilities. He was called upon to sanction the arrest of trespassers. Affidavits which he regarded as sufficient, were laid before him, and he granted the arrest. I am called upon to relieve an officer of the United States from a false and tortious imprisonment. He had to decide, I suppose, whether the party who complained before him had a right to the process he sought; he has decided that question. I have to inquire whether under any supposed cover of that process, the laws of the United States have been violated in the imprisonment of their officers, and this question I am going to decide.

And how do the learned counsel ask me to prepare for my decision? Because the judge of a State Court, in a proceeding necessarily *ex parte*, may have been imposed on by misstatements or suppressions of fact, am I therefore constrained in another cause, under another law, within a different constitutional jurisdiction, to make my hearing *ex parte* also; to hearken only to him, who has abused, it is said, the process of the law by falsehood or fraud, and refuse my ear to him whom the law specially enjoins me to relieve, if he has been wronged?

What is to be the consequence? A man swears to an assault and battery; the entire truth told, he was arrested for robbing the mint or the mail. Another swears to a trespass in breaking his close and carrying away his goods; the goods were stolen, and have been recovered under a search warrant. Both affidavits are the truth, unless that means the whole truth; they make out the *primâ facie* case of the plaintiff. What then? Is the officer to go to prison in default of bail, and to stay there because the rogue

Oc'r Sessions, 1853.

The Court's Opinion.

2nd Case.

swore to only half the story? Or would the argument change if the plaintiff should substitute another man's oath for his own, keeping himself aloof the while, not caring to proclaim his whereabouts?

But this is not to meet the question before me in all its breadth. He who has read the Act of Congress of March 2nd, 1833, or who remembers the times to meet which it was passed, knows perfectly well that it looked to the contingency of a collision between the General and the State authorities. There were statesmen then, who imagined it possible that a statute of the United States might be so obnoxious in a particular region, or to a particular State, as that the local functionaries would refuse to obey it, and would interfere with the officers who were charged to give it force, even by arresting and imprisoning them. In direct antecedence, therefore, to the section under consideration, they framed two other sections of the same statute, one authorizing the military forces of the United States to be employed in aid of the judicial power; the other authorizing a resort to especial jails for the safe-keeping of United States prisoners. It was necessary to go one step further. The military power might enforce the execution of the laws, when the marshal had failed and been made a prisoner himself for attempting to execute them; the prisons specially constituted might detain those whom the military had arrested; but the officer of the law, arrested in the discharge of his duty, imprisoned for the offence of attempting to discharge it, perhaps at the suit of the resisting State, more probably at the instance of some private grief, what was to become of him?

This seventh section meets the case, and gives the

Oc'r Sessions, 1853.

THE COURT'S OPINION. 2nd Case.

remedy. Is it credible that wise men, framing a statute for such an emergency, meant to deny to their judges to hear the wrong before they adjudicated the redress; or to draw upon the consciences of the men who had instigated the outrage on their officers, and to accept the recorded formalities by which the outrage had been consummated, as the only reliable and legal means of ascertaining facts and legitimate deductions from them?

It is not to be questioned, that there have been men in some quarters of the country, whose efforts, if successful, would have made this section as applicable in spirit, as it is in terms, to cases under the fugitive slave law; and I do not see the circumstances which at the present moment should make its reasonable construction, and the proper mode of giving it effect, different.

The whole course of the argument goes to show that the section applies alike to all cases in which an officer is imprisoned because of acts done in pursuance of the United States laws. It is altogether *a fortiori*, that the relief must extend to cases of arrest under civil process. The suit of an individual has no claims to superior dignity or consideration over a prosecution instituted by the State; nor is it generally as well considered, or as rightful.

I pass over the argument, which supposes that I am about to try this cause between the parties, to the exclusion of a jury. It is simply founded in mistake. I can neither acquit nor convict. Nor can my action arrest the proceedings in the State Court, nor have any effect on the trial there. The act of Congress, which gives to revenue officers the right to bring themselves for trial into the Circuit

Oct'r Sessions. 1853.

The Court's Opinion. 2nd Case.

Court, when their official conduct is in question, does not extend to the officers of the law.

If, therefore, there was such a case made out *ex parte* by Thomas, and such as, *primâ facie* and on his affidavits, showed an abuse of authority by the officers, I should hear the evidence which they wished to offer to repel it. But it is not necessary for me to do this, for there is in truth nothing in them which sufficiently connects any of the United States officers with the acts of violence of which Thomas complains.

There is nothing in them to show by whom he was wounded, nor in what manner, nor under what provocation, nor with what attending circumstances, nor who pursued, or menaced, or cried "shoot him," or fired or presented pistols. The relators are in no wise connected with any of these incidents, except that two of them are doubtingly and imperfectly referred to as having witnessed the scene near the river bank, and a third as having, a little while after the affair was over, given his name to a gentleman who inquired for it. As to Keith, the fourth named defendant in the writ of *capias*, he is neither named, nor described, nor alluded to.

And beyond this, there is nothing before me. The plaintiff himself, who could have sworn clearly and affirmatively to all the merits of his case, had made no affidavit. He could have told us how it came to pass that he was wounded, and whether he was the aggrieved or the aggressor in the affray. If he was not in fact the fugitive named in the warrant, and resolutely perilled his own life by assailing the lives of those who were charged to apprehend him—or if they transcended their authority, and he was beaten

Oc'r Sessions, 1853.

THE COURT'S OPINION. 2nd Case.

without cause; his affidavit might have possessed us of it all, without a resort to inference or rumour. He too could have identified the parties that beat, or shot, or menaced him.

What others have sworn to, not only fails to implicate the relators in any act of violence whatever, but it leaves it absolutely to be guessed at, whether the plaintiff has been wronged at all. I cannot but wish that his personal affidavit had been found with the rest. He is absent; but he has constituted and instructed counsel, and I am justified in assuming that they have not failed to apprise him that his own statement, under oath, was the usual and might be, perhaps, the indispensable condition of success in his application to imprison the relators.

I have already had occasion to observe, that in a case arising under this statute, I cannot feel myself restricted by the practice that governs applications for bailable process. But I think it safe to avail myself of the light which that practice reflects. "No plaintiff," says Judge Sergeant, in the case of *Nevins* v. *Merrie*,* "can be considered entitled to demand bail for a cause of action which he can neither positively swear to, nor allege sufficient facts and circumstances in the affidavit to satisfy the Judge of its existence." Equally safe, it seems to me, would be the rule, that an officer of this Court should not be detained in prison for an alleged abuse of his powers, without either a positive oath of merits from the plaintiff, or a sworn detail of circumstances to supply its place.

* 2 Wharton, 500.

RELATORS DISCHARGED.

[MINUTES OF THE 14TH OF FEBRUARY, 1854.]

The Third Case.

THE prisoners had not been discharged very long before they were arrested a third time, by the sheriff of Philadelphia county, under a bench warrant of outlawry from the quarter sessions of Luzerne county, based on an indictment found there by the grand jury, charging them with riot, assault and battery, and assault with attempt to kill; but not setting forth that the parties indicted were officers of the United States, nor that these alleged crimes had been committed while they were acting or professing to act in pursuance of a law of the United States, or under some order, process, or decree of some judge or Court thereof. The prisoners had recently presented a petition for a habeas corpus, in which petition they averred, that all their action in the matter which forms the subject of indictment was lawful on their part, and in pursuance of a legal warrant directed to them by a duly constituted commissioner of the United States, and indorsed by one of the justices of the Supreme Court.

STATEMENT. 3d Case.

On the return of the writ, the petitioners offering to prove these facts, it was objected, by Mr. *D. P. Brown*, that they were concluded by the warrant and indictment, and that this indictment not setting forth any case which could give this Court jurisdiction to interfere under the act of Congress of March 2d, 1833, ch. 57, § 7, (A) already stated, the Court could

(A) "That either of the justices of the Supreme Court, or a judge of the District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined,

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not go behind it; and it was argued that if the federal Courts could do what the petitioners asked, it could consider the case of every indictment found in any State, and, if they saw fit, discharge the party indicted; that this would lead inevitably to a conflict of State and Federal jurisdiction, impossible to coexist with union; and that, in this present case, conceding that the indictment was for an abuse of process, this Court ought not to interfere and withdraw the accused from trial in the Court where they were indicted, and which had first got jurisdiction of the case; because, if it did so, it would interfere with a settled rule of law, and there being no power under any act of Congress to try and convict the parties now indicted for an abuse of process, they could not be indicted, tried nor convicted at all.

After argument on the other side, by Mr. *J. W. Ashmead*, D. A. U. S., the opinion of the Court, Judge Grier having been absent at Washington during the hearing, was delivered in substance as follows:—

The Court's Opinion. 3rd Case. Kane, J. May 9.

Kane, J. This is one more branch of the controversies—I sincerely hope it may be the last—that have grown out of the attempted arrest of a fugitive slave in Luzerne county, some time since.

In deciding the case that was before me in February last between the same parties, I adverted to the spirit of the section of the act of Congress of March 2d, 1833, ch. 5, under which I have awarded the writ of habeas corpus in this case, as this spirit is illustrated by the

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on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof."

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context, and by the time and circumstances of its enactment.* On this point I have nothing to add. The phraseology of the statute is unequivocal in its import, and entirely consonant with its apparent object. It applies in broad and general terms to all officers of the United States, by whatever law or authority confined—with only this limitation, that the confinement must be for an act done or omitted in pursuance of a law of the United States, or in obedience to process of the Federal Courts.

* Ante, p. 535.

This limitation presents the only question on which I have to pass. I am not called upon to inquire by what form of process the relators are held, by whom it was solicited or authorized, or issued or executed; but whether our officers are or are not imprisoned for acts done by them in pursuance of law or process. This is clearly in part a question of fact; and it seems to me that in determining it, I cannot be restricted to the evidence which may be found among the records of another Court.

An illustration or two, not altogether without suggestive analogies in the history of our times, may make this plainer than a studied argument. If in a momentary fervour, a State should so far forget the Constitution of the United States as to denounce every apprehension of a fugitive as a battery or a riot, and a Court were to sentence the marshal's officers because they had obeyed the act of Congress of 1850; or, if the statute of a State had inhibited the collection of duties on imported goods, and the State Court had imprisoned an officer of the customs for disregarding the enactment; or, if a State, in the transcendental spirit of reform, should forbid the infliction of capital punishment within its borders as a

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crime, and her Courts were to convict our Marshal of felony for executing our writ that commanded him to inflict it; can any one doubt, whether, under the words or according to the spirit of this section, it would be my duty to discharge him? A Federal officer, undergoing imprisonment for an act definitely enjoined on him by the laws and process of the United States!

And yet, I can well imagine that the record in either of these cases would say nothing of the official character of the prisoner, or of his justification under the authority of the general government. If, then, the act of Congress is to be made operative for the protection of the officer, he must be permitted to go behind or beyond the record, under which he is confined. And if he could claim to do this, even after conviction, how much more clearly before? If not concluded by the result of a trial, of which he had notice, and in which he perhaps took part, how much more clearly not by the preliminary action of a committing magistrate, or the *ex parte* finding of a grand jury!

The rule which has been referred to, as obtaining so generally in the cases of concurrent jurisdiction, that the Court, which first asserts jurisdiction, shall retain it to the end, does not apply. That is a rule of comity, founded on the general convenience, seeking to avert a conflict of action between two sets of Courts. It assumes that the jurisdictions are concurrent, and the controversies the same.

But in cases like that before me, either the subjects of controversy in the two Courts are not the same, but the proceedings involve differing questions of law or fact; or invoke differing modes of relief or

censure; or else, all these being the same in the two Courts, it was the object and purpose of the act of Congress to make the jurisdiction of the federal Court revisory, and its action controlling, for the very reason that otherwise, such a conflict might exist between the two. On the first of these suppositions, there has been no prior assertion of jurisdiction by the tribunal of the State; on the other, the relation of the Federal to the State Courts is adversary rather than concurrent. In a word, then, as I read the section, it is my duty to hear and determine, notwithstanding the proceedings that have been had before a State Court, just so far as may bear upon the question of the relators' right to a discharge under the laws of the United States. But no further. I am not to decide the question of their guilt or innocence upon the charges preferred in this indictment. I have no authority to do this, either without or with a jury. My duties are performed when I have released the prisoner from unlawful imprisonment; for that imprisonment is unlawful, however formal it may be, that affects to punish for an act enjoined or justified by the supreme law of the land; or when I have remanded him to abide his sentence, or to take his trial.

It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them, will in effect prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this Court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere

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recognize it as a right of the government, either State or Federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction; it is arrested by the entering of *nolle prosequis* while the case is at the bar; it is made ineffectual at any time by the discharge on habeas corpus—it is in many cases controlled, or even negatived in advance, by the judge's certificate of probable cause. And there is no harm in this. No one imagines that because a man is accused, he must therefore of course be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals—still less of retaliating them. Their objects are general: they look to the public well being; and if this can be more readily or more certainly promoted by withholding the cause from trial than by pressing it on to a verdict, it is politic, and it is not unjust, so to withhold it.

Yet, though the marshal or his deputy cannot be tried by a jury, if he has acted in obedience to federal process, he may still be punished if he has abused it, and that by the Court itself from which the process issued. The misbehaviour of any of our officers in their official transactions is a contempt, specially excepted from the operation of the act of 1831;(A) and being so excepted, it remains within our judicial cognizance. We may vindicate, therefore, the abuse of our process in the most summary manner, and with

(A) By which it is enacted, "that the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempt of Court, shall not be construed to extend to any case, except the misbehaviour of any person or persons in the presence of the said Courts, or so near thereto as to obstruct the administration of justice, *the misbehaviour of any of the officers of the said Courts in their official transactions*," &c.

an emphasis of censure that can rarely be incommensurate with the offence. (A)

And on the other hand, there seems to be good reason why the Court which issued the writ should itself judge of the fidelity with which it has been executed, and either punish or protect its ministerial officer. The process is not merely a warrant, but a mandate also, to be obeyed by the officer without regard to his judgment of its propriety, or his sympathies, or his fears. And the same local statute, the same sectional excitement, the same indignant feeling, whether enlightened and honest, or the reverse of both, which denounces the Marshal for execution of a writ, should more properly condemn the Judge for awarding it. It is right that the responsibility should attend upon the discretion. But all this is foreign to the question before me.

If the evidence shall present the case of an imperfect justification; if it shall show that these relators, or any of them, have transcended the rightful limits of their authority, and have wilfully or ignorantly violated the law, no considerations of policy or sympathy will press upon this Court to rescue them from punishment, by withholding them from the tribunal which demands their presence. But, on the contrary, if it shall appear before me that they honestly and rightfully sought to execute their writ; that they employed force only because it was needed, and no more than was needed;—they must not be

(A) It is possible, for the reason which is suggested by the argument in the text, that while the act of Congress of 1833 provides for the transfer to the federal Court by *certiorari* of proceedings instituted in the State Courts against officers of the revenue, it makes no such provision for the case of officers of the law; the law of contempt being regarded as adequate to the punishment of abuses of legal process.

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withdrawn from their daily recurring official duties, and sent away with the sanction of the Court, under whose mandate they have acted, and by whom their action has been approved, to take their trial in a distant part of the country. I have unreserved confidence in the ability, integrity, and patriotism of the Court from which this bench warrant has issued; but I may not deny to these relators a discharge from what I deem unlawful imprisonment, however content I might be to submit my own liberty or honour to the guardianship of the learned justice who presides there.

I must therefore proceed to hear the case on its merits under the act of Congress, and to that end must receive the evidence which is offered by the relators.

[MINUTES OF THE 9TH OF MAY, 1854.]

STOWE V. THOMAS.

[COPYRIGHT: TRANSLATION.]

A prose translation (having no qualities of a paraphrase) of a copyright prose romance, which the author had herself caused to be translated in a way she liked, and copyrighted, is not an infringement of the author's copyright of the original.

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* Act of February 3, 1831.

THE act of Congress* respecting copy-rights gives to the 'author of any book' the 'sole right and liberty of *printing, reprinting, publishing* and vending *such book:*' and if any other person shall *print,* publish or import, &c., "*any copy of such book*" without the consent, &c., affixes certain penalties for the infringement of copy-right.

With this act in force, Mrs. Harriet Beecher Stowe published in 1850–1–2, a romance called "*Uncle Tom's Cabin: or Life among the Lowly.*" The copyright had been duly secured. The book became very popular, and soon after its publication Mrs. Stowe "employed at much expense Hugo Rudolph Hutton, a competent German scholar of ability and critical knowledge of the German language, as also of the English, to translate and copy it into the German language." Dr. Hutton was assisted in his labours by Mrs. Stowe's husband: and by these individuals, at her expense, her said book, as she alleged, had "been fully, completely, accurately and skilfully translated and copied, printed and published in the German language;" and in that form duly secured by copy-right.

With this original and translation before the

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public, the defendant made a second translation into German. It appeared in chapters, in the columns of a daily newspaper, *Die Frie Presse;* the type before distribution being used to print a re-publication in pamphlet form. The ordinary formalities to secure copy-right had been taken in regard to this translation. *The Frie Presse* was printed at Philadelphia and circulated extensively among the German population with which that place and adjoining parts of Pennsylvania are known to abound.

There being no considerable dispute about facts, the question on this bill for *injunction* was, whether the translation was an infringement of Mrs. Stowe's copy-right in the original.

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Messrs. *S. H.* and *S. C. Perkins*, for Mrs. Stowe. The question is novel. There are no decisions on the point either in England or in the United States, and but recently in France. Prussia, in her general code of 1791,* and the general law of 1837;† Russia, in the Digest of 1835;‡ and Belgium, by the laws of 1814§ and 1817,‖ have all deemed the subject of importance enough to make it one of express provision. We have no express legislation, but the subject has been discussed abstractly by text-writers. The question is more important in America than elsewhere, owing to the originally mixed character of our people, and to the constant emigration of foreigners to our country, most of whom become our citizens long before they can read our language. This influx from the continent of Europe is greatly increasing. It will go far to change the nature of our population. There is no doubt that the question is of deeper importance in this country than it ever

* §§ 1027, 1028, 1 Renouard, 267.
† § 4, id. 268.
‡ Tit. 2, id. 288.
§ Art. 12, id. 248.
‖ Art. 2, id. 249.

has been in this or in any other country, at any time before.

An author is the "creator," the "efficient cause" of a thing."* In respect to a book, he is the creator of the ideas—the thought—the plan—the arrangement—the figures—the illustrations—the argument —the style of expression. The exclusive right to sell these is what is secured by copyright. The right is original, inherent; a right founded on nature, acknowledged, we think, at common law; a right which stands on better ground and is more deeply rooted than the right to any other property whatever.†(A) Now

* Webster's Dictionary.

† See Marlin's argument, 3 Repertoire de Jurisprudence, 701, tit. Contrefaçon, § 11.

(A) "It is provided in the Constitution of the United States," says Mr. Webster, "that Congress shall have power to promote the progress of science and the useful arts by securing for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. The law acknowledges the existence of the right of an inventor to his invention as property, and the Constitution is remarkably exact in the language in which it speaks of this important subject. The Constitution does not attempt to *give* an inventor a right to his invention, or to an author a right to his literary productions. No such thing. But the Constitution *recognizes* an original, pre-existing, inherent right of property in the invention, and authorizes Congress to secure to inventors the enjoyment of that right. But the right existed before the Constitution and above the Constitution, and is, as a natural right, more clear than that which a man can assert in almost any other kind of property. What a man earns by thought, study, and care, is as much his own, as what he obtains by his hands. It is said that, by the natural law, the son has no right to inherit the estate of his father—or to take it by devise. But the natural law gives man a right to his own acquisitions, as in the case of securing a quadruped, a bird, or a fish by his skill, industry, or perseverance. Invention, as a right of property, stands higher than inheritance or devise, because *it is personal earning*. It is more like acquisitions by the original right of nature. In all these there is an effort of mind as well as muscular strength.

"Upon acknowledged principles, rights acquired by invention stand on plainer principles of natural law than most other rights of property. Blackstone, and every other able writer on public law, thus regards this natural right and asserts man's title to his own invention or earnings.

"The right of an inventor to his invention is no monopoly. It is no monopoly in any other sense than as a man's own house is a monopoly. A monopoly, as it was understood in the ancient law, was a grant of the right to buy, sell, or carry on some particular trade, conferred on one of the king's subjects, to the exclusion of all the rest. Such a monopoly is unjust. But a man's right to his own invention is a very different matter. It is no more a monopoly for him to possess that, than to possess his own homestead.

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a translation is an infringement of this right. The translator aims to convey to the mind of his reader the ideas and thoughts of the author; nay, the very shades of his ideas and thoughts; his exact manner and form of expression, and even his words, so far as represented by similarly constructed expressions in the new language. All changes, all variations in any of these particulars, are failures, and are studiously guarded against. Particular language—words of one tongue as distinguised from words of another—are but the *signs* of his ideas. A *perfect* translation will present the identical creation and mental production, in a way that the *sign* is never thought of.

A mere or bare translation, which this is, even though spirited, if it be so, calls for no creation on the part of the translator. Any one who understands two languages can translate from one to the other. The translation is the same book. We have nothing to do in this case with the question of paraphrase, or rendering from prose to poetry, or *vice versa*.

"But there is one remarkable difference in the two cases, which is this, that property in a man's own invention presents the only case where he is made to pay for the exclusive enjoyment of his own. For by law the permission so to enjoy the invention for a certain number of years is granted, on the condition that, at the expiration of the patent, the invention shall belong to the public. Not so with houses; not so with lands; nothing is paid for them, except the usual amount of taxation; but for the right to use his own, which the natural law gives him, the inventor, as we have just seen, pays an enormous price. Yet there is a clamor out of doors, calculated to debauch the public mind.

"But a better feeling begins to prevail. A more intelligent estimate of this species of property begins to spring up. Yet I am sorry to say, that there have been men—there are still some men in the community,—who would not do an immoral action, who would not for their lives, 'pick a flaw' in their neighbour's title-deed, and who yet make no scruple of endeavouring by every means in their power to 'pick a flaw' in his patent. That feeling is unjust, illegal, and unsocial." (*Speech at Trenton N. J., March*, 1852, *in Goodyear* v. *Day*.)

See also a beautiful defence of the rights of Authors in the American Law Register for 1853–4, vol. 2, p. 129; an essay not more remarkable for its convincing strain of argument, than for its happy and dignified temper.

Those matters may present difficulties. Our case is simple and does not touch them. This is a mere translation, and is no more a new book because every American cannot understand it, while every German can, than a book printed in common characters from a copy in raised characters (such as is used by the blind) is a new or different book, because a blind man cannot read this first, while one who has the use of his eyes can.

Admitting, as is true, that great genius of a particular kind is required to make a *perfect* translation, so much the worse. It is great genius applied to present everything which is the author's in a form which is his in everything but his right to profit by it. It is great genius applied to great wrong; and the greater the genius, and the more perfect his work, the greater the wrong.

There is not so much genius required to translate a book into a foreign language, as to translate it into other words in the same language. Yet, if a man were to put the identical ideas, and every characteristic of a book, except its words, into synonymes, would it escape?

Independently of this, genius or labour misapplied, cannot consecrate its success. It may take a vast deal of both genius and labour to perpetrate a successful forgery, but the Court would hardly hold a man of genius, who thus exercised it, the lawful owner of the property which he got. His genius, like that here, is of the sort which we say is "worthy of a better cause."

The translator is wholly dependent on that which is the author's. His act at best is a voluntary and wrongful mixture of his labour with that which

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belongs to another, and from the result of which he can therefore claim no profit. Being a chemical as distinguished from a mechanical or separable mixture, he must lose all.

If no translation is an infringement, a work may be published in any characters different from those used by the original author, and adapted to another class of readers, without any violation of his rights. It may be published in phonographic or phonetic characters, which, while they convey to the mind of some readers the identical ideas, words, and style of the author, convey to others unacquainted with those characters, no ideas at all. Could an algebraic work be printed and published without infringement by the employment of different characters to represent the algebraic formulas? Could a treatise on chemistry, or other science purely, or indeed any work where the thought, or argument, or facts, or narrative was everything, or the great thing, and the style, language, or mode of communication nothing, or a small thing, be translated with impunity? Where is the Court to stop? Take such a book as Euler's Algebra, which, dealing very largely in algebraic formulæ, a fine mathematician would in some degree understand in its original form, even though he understood not the original language—might that, if copyrighted here, be translated into a form purely English with impunity? Could a profound course of mathematical argument, set forth by algebraic process, be resolved, as it may often easily be, in the different shape of linear exhibition? Perhaps it might: but could one by printing or painting in different colours, a *design* invented or produced by another, escape the penalty of the act of Congress

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for the protection of designs,* and enjoy its protection for the mere change of colours? Could a drawing, where the drawing might be everything, done in line engraving and protected by copyright, be mezzotinted or lithographed with impunity? These last are our case.

* Aug. 29, 1832, c. 318, § 8.

Again, unless a translation is an infringement, both the original work and the translation must be regarded, with respect to further translation, as *publici juris;* and the translation may be re-translated into the original language. Even in a book where the style was a great matter, the demand which would make it profitable to publish a translation would recompense such a double process of translation. In a work of science, or in any work where style was not important, the re-translation would be just as good as the original. Indeed, if as often happens with the literary composition of scientific men, the style of the book was obscure or otherwise bad, the re-translation might, with no merit in the translator, be better than the original. The author would find no protection by publishing simultaneously in two or more languages. Mrs. Stowe did actually translate this book herself into German; but she thereby only afforded encouragement and facilities to another desirous of interfering with her profits.

If a translation be not an infringement, it must itself, and independently of its character *quâ* translation, be entitled to protection as possessing the quality of originality. But who would contend that this is so?

So far as this question depends on authority, authority is with us. Without citing the cases, it may be stated generally that the principle of them lies in

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this question, "Whether the work complained of could ever have existed, had not the original existed, without a coincidence in the mental conceptions and modes of expression of the original author and the alleged infringer, so striking as to be beyond all probability?" Or in this, "Whether the alleged infringer had used the literary property of another, not as a centre about which to group his own thoughts and ideas and in his own style, but as that, out of which *itself*, from its peculiar and intrinsic value, he has undertaken by publication to make profit for himself?" Or, to advance a step upon the last form of question, "Has the original author suffered, or will he suffer, injury from the act complained of?"*

* Curtis on Copyright, p. 240.

All these tests are with us. The translator, it will be confessed, has taken our object, plan, facts, sentiments, narrative, and all our communicable style; taken, in short, everything down to our parentheses, exclamation and punctuation points. Nothing is changed but the arbitrary mechanical signs, no way connected with the essentials of anything, through which some of these are conveyed; and this is in a work where the plan, object, fact, sentiment, and narrative, is everything, and style—so far as it is incommunicable and not taken—is nothing. Undoubtedly, too, the author is injured. If it is a perfect translation, she is injured in the sale of her work; for there are numbers of people in our country who, reading two languages indifferently, will read it in that one which costs the least. If it is a bad translation, she is injured still more in her reputation; for there is another vast class who will have no conception of the book other than that which comes through a translation, whether it cost much or little.

Against both classes, so far as both classes are our own people, the copyright act was meant to extend. Has any one doubted that Congress meant to secure to authors the profits from their work throughout the length and breadth of this country? Yet the argument of the defendant would deprive them of any profits as respects a vast class of our people; and not only so, but it would give to our population from abroad, many of them still foreigners in every sense, a privilege denied to our native citizens. It is begging the question, to say that we have secured the copyright in English, and in English alone.

The point now in controversy has been several times already adjudicated in France. M. Jules Delalain upon the law of July 19, 1793, says, "On trouve dans la jurisprudence plusieurs décisions en ce sens. Un arrêt de la cour de Rouen, (7 Novembre, 1845,) deux arrêts de la cour de Paris, (17 Juillet, 1847, et 26 Janvier, 1852,) reconnaissent aux auteurs seuls on à leur agents le droit de publier ou d'autoriser la traduction de leurs œuvres dans une langue étrangère."* In *Lumley, Appellant*, v. *Bayard and Donizetti, Appellees*,† (not referred to by M. Delalain,) Donizetti had written the music of *La Fille du Regiment*, and Saint Georges and Bayard its French words. Both were rightfully represented at the *Opéra Comique*. Lumley taking the music, and by the permission of Saint George, but not of Bayard, translating the words into Italian, brought both out at the *Theatre Italien*. The question of the music was of course involved as well as that of the words. But the Court is just as strong on the subject of the words as on that of the music: "The Court being of opinion," says the decree, "that the opera

* Legislation de la Propriété Litterare 3ime edit. Paris, 1853. P. 5, n. 2.

† 1 American Law Register, 499.

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styled *la Figlia del Reggimento*, and represented by Lumley at the Theatre Italien is the same as that the *words* of which were written by Saint Georges and Bayard, &c. . . . . that the *translation* of the French words makes an unimportant (*insignifiante*) difference between the pieces; . . . that the change or translation of the words can have no influence so far as regards the composer of the music. . . . . Being also of opinion *with regard to the words that their authors have therein a right of property which should belong to them fully and exclusively;* that if a *mere* translation were permitted to compete with the original," &c., were of opinion against Lumley. The Court speaks of the "alteration of the words, especially when in so *subordinate* a form as a translation."

In England there is no doubt as a matter of fact that a translation into English of Burnet's *Archæologica*, written by the author in Latin, was injoined.* The reasons for the injunction are not *so* clear; though we think that they are still clear enough. The case arose on a statute much like ours, the Act of 8 Anne, ch. 19.† It is entitled an Act "for the encouragement of learning by vesting the *copies of printed books in the authors or purchasers of such books*," &c. It recites that "*Printers*, booksellers and other persons have taken the liberty of *printing, reprinting* and publishing books and other writings:" and enacts the author of any book already printed, &c., or the "*printer or printers*, or other person or persons who hath or have purchased the copy or copies of any books in order to *print or reprint* the same, shall have the sole right or liberty of *printing* such book or books; and that if any other person print, *reprint* or import any such book," &c. The

* Burnett v. Chetwood, 2 Merivale, 441, note.

† 4 Ruffhead, 401.

act expressly provides—we may add—that it shall not prohibit "the importation, vending or selling of any books in Greek, Latin, or *any other foreign language printed beyond the seas.*" A translation made *abroad* would clearly not come within it. The only report we have of the case is from the Register's Book, and from a note of counsel, reporting the argument of the defendants alone. The former shows that the grounds of applying for the injunction were that "the book was *only intended* to the learned, and for that reason was wrote in Latin and not in the vulgar tongue . . . . and that the said translation is erroneous, and the sense and words of the author mistaken and represented in an absurd and ridiculous manner;" in other words that the author had a right to say whether his book should be translated at all, and if he was willing that it should be, then to control the manner of translation. There is nothing said in the application of the book's being of a *mischievous tendency*, which on an application by the *author's own executor* would have been of itself, at that time, probably, as now certainly, an answer to any application for an injunction; whatever it might have been to an application from the *crown*. When the case came to be argued, counsel opposed to the application argued that the copy-right act was "intended only to restrain the mechanical art of printing . . . . . but not to hinder a translation of the book into another language, which, *in some respects*, may be called a different book, inasmuch as *some* skill in language is requisite thereto . . . . that the translator dresses it up and clothes the sense in his own style and expression." Lord Chancellor Parker —responding, clearly, to the argument, and, in a

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qualified way, granting it *for argument's sake*—said, "that though a translation *might* not be the *same* with the *reprinting* the original . . . . yet this being a book which to his knowledge, (having read it in his study) contained strange notions *intended by the author* to be concealed from the vulgar in the Latin language, in which language it could not do much hurt . . . . he thought it proper to grant an injunction." He put in afterwards, to be sure, in an adjectitious form, "that he looked upon it that this Court had a superintendency over all books, and might in a summary way restrain the printing and publishing of any that contained reflections on religion and morality." But the moving ground of the injunction was the *intention* of Dr. Burnet.

Several text writers, American and foreign, are of opinion that a translation like this *is* an infringement. Mr. Curtis,* of our own country, puts the question, "Does the mere act of giving to a literary composition the new dress of another language, add to the case an element which ought to take it out of the rule by which reproduction in other forms is prohibited?" He thus resolves it negatively: "To attribute to such a new medium the effect of entire originality, is to declare that a change of dress alone annihilates the most important subject of his right of property. It reduces his right to the narrow limits of an exclusive privilege of publishing in that idiom alone in which he first publishes. But we do not find that his privilege is thus circumscribed; because a mere change of phraseology is not held to justify the adoption of matter that is under the protection of law." The French jurists, Pardessus,† and Etienne Blanc,‡ hold this same opinion.

* On Copyright, 292.

† Droit Commercial, Tit. 1, Nos. 164, 167.

‡ Traité de la Contrefaçon, 416.

The counsel on this side, made also a learned examination of the question of copy right at common law, and independent of the statutes securing it.

Argument. For the Translator.

Mr. *Goepp* and Mr. *B. H. Brewster*, contra.

The act of Congress speaks of *re*printing such books as the author had previously *printed:* and the prohibition is only against printing, publishing or importing "any copy of *such* book." In no parlance —either ordinary or legal—does 'copy' mean 'translation:' and the act of Congress does not enact that a translation shall be considered a copy. On the contrary, it uses the term 'copy' clearly in the sense of reprint. On principle a translation is not an infringement. The subject of a book is confessedly not capable of copy-right. Writing and thinking are separate things, and the results of distinct gifts and of separate labours. Thought is the gift of heaven; style or ease in writing, comes from art. The thought may be more meritorious than the style; but the thought, independent of its language, cannot be protected; and therefore literary property attaches not to the thoughts as expressed, but to the expression of the thoughts; that is, to the language in which they are conveyed. A book which had little or no thought, would as much be the subject of copy-right, as if it was the Essays of Francis Bacon: and a copy or reprint of it, would be as completely within the statute, as if it contained the profoundest, the most original and inestimable discoveries or truths. This may arise from the inability of men to secure perfect justice on earth; but it is necessary to secure the greatest measure of justice which we can.

There being here no question of a *verbatim* copy

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ARGUMENT. For the Translator.

or of colourable variations, the only question is whether there is a servile and mechanical imitation. We have confessedly taken not a part, but the whole. We concede and we boast that we have taken every syllable, comma and i-dot of the original. The question cannot be how much we have taken, for we have taken all; nor how much we have added, for we have added nothing: but only *how* have we taken, and what have we done with it? The criterion given by Lord Lyndhurst,* is "whether the appropriation could have been made by a mere mechanic in literature, or whether it required the aid of *genius and reflection?*" Is the work such as any body, if *ordered*, like a tradesman or mechanic, to make it, would have produced substantially in the same shape as at present? Or is it such as would not have had the same merits and the same character, if produced by any body but the one who did produce it? In the former case it is servile. In the latter it is the creation of genius. This is not the case of an almanac, or a collection of chemical recipes, or a set of algebraic or nautical calculations, in which every word is a term of science, and has an exact correlative, which may be found by a mere mechanical exercise, analogous to that of a printer, when he seeks a type corresponding to the written character. A translation of a romance, or any like work, depends entirely for its success upon its individuality, and for that reason, is original with the translator.

* Jollie v. Jaques, 3 American Law Journal, 402; D'Almaine v. Boosey, 1 Younge & Collyer's Exchequer, 288—300.

It is settled that translations of books, not copyrights, are subjects of copy-right:† and in this respect they are undistinguishable from other works. To exclude us from the benefit of the rule, is only

† Wyatt v. Barnard, 3 Vesey & Beames, 77.

possible on the basis of an alleged distinction between translations from originals not copy-righted, and translations from originals secured. The distinction is unfounded in authority. In principle it proves too much, for it would make reprints (which are mere copies) from foreign works, legitimate subjects of copy-right. It will not do to say, that a translator is a copyist, so far as he appropriates, and an author, so far as he contributes his own exertion. Every copyist, every reprinter contributes his own exertion, and every author appropriates thoughts from others. The argument would result in subjecting a translator to prosecution by those from whom he has translated, and at the same time allowing him to take advantage of his own wrong, by prosecuting those who reprint his translation. There is no hybrid between a thief and a thinker. Author and copyist are irreconcileable opposites. If a translation were a copy, it would, under any circumstances, be incapable of copy-right. Having, under some circumstances, been adjudged capable of copy-right, it has been adjudged to be no copy under any.

The author's rights are not injured. A translation enhances the value of the original. None will buy the former who are able to read the latter: and the translation attracts the notice of many to the original. If Mrs. Stowe had not thought so, she would not herself have published a German translation. The sale of her translation, indeed, was impaired; but we are not charged with a piracy of *it:* and the reason why it is injured, is that her translation has less genius than ours.

The analogy of a mechanical or chemical mixture is untenable. A mechanical mixture may be said to

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ARGUMENT. For the Translator.

have occurred when the translator bought the book; but this cannot be complained of, because the monopoly of selling it, is the very subject of the claim. A chemical mixture took place, if at all, when he read it, and it became amalgamated with his own mind; when, by the *communication*—which is the soul and essence of the book—the ideas of the writer were imparted to the reader. But to complain of this, would be to complain of the very purpose of the copy-right law itself; the monopoly of reproducing the material, mechanical engine of the communication, the body of the book, was granted for no other consideration than the general diffusion of the communication itself. Anything, therefore, which legitimately ensues upon the reading of the book, is *publici juris*, and outside of the author's privilege. A book may be copied and reprinted without being read; but must be read to be translated or abridged. Translation or abridgement is, if any thing, an organic, germinating process, entirely outside the circle of the law on bailments.

On authority: *Burnet* v. *Chetwood*, cited on the other side, is really no authority for any thing; or, if authority, is for us. The petition for injunction, puts the case on Dr. Burnett's *intention* to keep his book locked up in a learned tongue, and upon the injury which the translation brought upon his character, by his sense and words being "mistaken and represented in an absurd and ridiculous manner." But the Lord Chancellor grants no injunction on those grounds. He travels out of the record to find other ground for his decision, and introduces a new element, to wit, that having himself read the book, he knew it to contain *strange* notions, which, while

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ARGUMENT. For the Translator.

they were in the Latin tongue, "*could not do much hurt;*" but which, he implies, if translated, would be very noxious. He treats the book as one containing "*reflections on religion and morality,*" and therefore within his summary control, as a guardian of public morals. To say the least, he seems to have had serious doubts whether, on the ground set forth by the petition, he could interfere; and to have been pressed by the consideration that a translation was not within the act, because the translator had bestowed "*care and pains*" upon his work.

Mr. Curtis, of our own country, though his book is laborious and valuable, goes to lengths quite untenable on the subject of protection to authors. His opinion on translations is in conflict with Mr. Godson, the English author. As to the cases cited from France, it is enough to say, that we know nothing of the words of the legislative enactments on which they are founded. And with respect to the speculations of its text writers, that the speculations of one are answered by the speculations of another; that while the name of Pardessus is found on one side, that of Renouard, which 'weighs as much,' and 'sounds as well,' is ranged upon the other.*

* See Curtis on Copyright, 293, n.

THE COURT'S OPINION.

GRIER, J. In the balance of opinions among learned jurists, we must endeavour to find some ascertained principles of the common law as established by judicial decision on which to found our conclusion.

In order to decide what is an infringement of an author's rights, we must inquire what constitutes literary property, and what is recognised as such by the act of Congress, and secured and protected thereby.

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THE COURT'S OPINION.

An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise.

The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist as dissevered from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright.*

* Curtis on Copy, 9, 10, 11, &c.

The statute of 8 Anne, c. 19, (which so far as it describes the rights and property of an author, is but declaratory of the common law,) is entitled,

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THE COURT'S OPINION.

"An Act for the encouragement of learning, *by vesting the copies* of printed *books* in the authors, &c." It gives the author "the sole right of printing and reprinting such *book* or *books*," and describes those who infringe the author's rights, as persons "printing, reprinting, or importing such *book* or *books*" without the license of the author. Our acts of Congress give substantially the same description both of the author's rights and what is an infringement of them.

Now, although the legal definition of a "*book*" may be much more extensive than that given by lexicographers, and may include a sheet of music as well as a bound volume; yet, it necessarily conveys the idea, of thought or conceptions clothed in language or in musical characters, written, printed or published. Its identity does not consist merely in the ideas, knowledge or information communicated, but in the same conceptions clothed in the same words, which make it the same composition.* A "*copy*" of a book must, therefore, be a transcript of the *language* in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or "*copy*" of the same "*book*." I have seen a literal translation of Burns's poems into French prose; but to call it a *copy* of the original, would be as ridiculous as the translation itself.

*2 Blackstone's Commentaries, 406.

The notion that a translation is a piracy of the original composition, is founded on the analogy assumed between copy-right and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it

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THE COURT'S OPINION.

embodies the principle or essence of the invention. But as the author's exclusive property in a literary composition or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious. Hence, in questions of infringement of copyright, the inquiry is not, whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a *new work*, requiring invention, learning and judgment, or only a mere transcript of the whole or parts of the original, with merely colourable variations. Hence, also, the many cases to be found in the reports, which decide that a *bonâ fide* abridgment of a book is not an infringement of copyright.

To make a good translation of a work, often requires more learning, talent and judgment, than was required to write the original. Many can *transfer* from one language to another, but few can *translate*. To call the translations of an author's ideas and conceptions into another language, a *copy* of his *book*, would be an abuse of terms, and arbitrary judicial legislation.

Although the question now under consideration, was not directly in issue in the great case of *Millar* v. *Taylor*,* yet the inference that a translation is not an infringement of copyright, is a logical result, and stated by the judges themselves as a necessary corollary, from the principles of law then decided by the Court. That case exhausted the argument, and

* 4 Burrows, 2303.

has finally settled the question as to the nature of the property which an author has in his works; and it is, that after publication, his property consists in the "right of copy," which signifies "the sole right of printing, publishing and selling his literary composition or book," not that he has such a property in his original conceptions, that he alone can use them in the composition of a new work, or clothe them in a different dress by translation. He may be incompetent to such a task, or to make a new work out of his old materials, and neither the common law nor the statute give him such a monopoly, even of his own creations.

An author, says Lord Mansfield, has the same property in his book, which the king has to the English translation of the Bible. "Yet if any man should turn the Psalms, or the writings of Solomon, or Job, into verse, the king could not stop the printing or sale of such a work. *It is the author's work;* the king has no power or control over the subject-matter. His power rests in *property*. His whole right rests upon the foundation of *property in the copy*." Mr. Justice Willes, in answer to the question, "Wherein consists the identity of a book?" says, "*Certainly, bonâ fide* imitations, *translations* and abridgments are different, and in respect of property, may be considered *new works*." And Mr. Justice Aston observes: "The publication of a composition does not give away the property in the work. But *the right of copy* still remains in the author. No more passes to the public from the free will and consent of the author, than *unlimited* use of every advantage that the purchaser can reap from the doctrine and sentiments which the work con-

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The Court's Opinion.

tains. He may improve it, imitate it, *translate* it, oppose its sentiments; but he buys no right *to publish the identical work.*"

The distinction taken by some writers on the subject of literary property, between the works which are *publici juris*, and of those which are subject to copyright, has no foundation, in fact, if the established doctrine of the cases be true, and the author's property in a published book consists only in a right of copy. By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, "*copies* of her *book.*" A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.

BILL DISMISSED WITH COSTS.

[EQUITY DOCKET: NO. 9, OCTOBER SESSIONS, 1852.]

CROMWELL V. THE BANK OF PITTSBURG.

[EQUITY OF REDEMPTION: ESTOPPEL IN PAIS: PENNSYLVANIA RECORDS: ENTRY AND PRESUMPTION OF FORMAL JUDGMENT: CORRECTION OF CLERICAL MISPRISIONS.]

Even where no judgment of foreclosure has been entered on a mortgage, if the mortgagor allows the mortgagee to hold possession for twenty years without accounting, or without admitting that he possesses the mortgage title only, the mortgagee's title becomes as absolute in equity, as it was previously at law; and this though the land has grown greatly valuable during the term.

Even where no judgment of foreclosure has been entered on a mortgage, yet if the mortgagro has admitted in writing the whole mortgage debt to be due; has assisted by his signature and acts to forward and expedite the master or sheriff's sale of the mortgaged premises; waiving matters of form; surrendering possession to the purchaser; and moving away, or standing by and suffering purchasers, for large and valuable consideration, to improve the property,—he is equitably estopped *in pais* from asserting his ownership for want of a proper authority, at the time, in the master or sheriff to sell.

The history of records and of the mode of entering judgments in Pennsylvania, is given in this case in detail; and the loose and careless mode of preserving judicial papers, and transacting matters of form, by judges, prothonotaries, attorneys and parties in Pennsylvania, set forth. It is declared that a record is seldom or never, and never need be, made up at the time in form; all that is required being sufficient outline entries upon which, as upon a fabric or frame, a formal record can be afterwards wove or filled in, so as to be certified if wanted.

No actual, formal entry of judgment, on any docket or other paper, need be made by either Court or prothonotary to justify the issue of final process, as on a judgment. If the party himself, prior to the precipe for final process, have signed a paper meant to authorise such entry—whether such paper be expressed in the present or in the past tense—it is enough. The clerk may enter judgment on his dockets, or make up a formal record at any time afterwards. e. g. If a party by writing, signed, says, "In my proper person, I this day appeared and confessed judgment to the plaintiff, for, &c., besides costs," &c., on this final process may issue, even though no more formal entry of judgment have been made on the docket, or on the record by the Court or prothonotary, or by any body.

The original or rough docket upon which, according to ordinary practice of the Court, judgments were formally entered, having been lost, such formal entry of a judgment, may, at the distance of thirty years, be presumed, from the fact that the defendant in the case had signed a writing, filed among the papers of the case, prior to the alleged date of judgment, saying that he had appeared and confessed judgment; this writing being followed immediately by a precipe for final process, and by final process itself, both of which recite a judg-

ment; by an agreement of the defendant expediting the sale, indorsed on such final process; by an actual sale made with his concurrence, and remaining unquestioned by him during the residue of his life, a term of about thirty years. And this although the final process recite a judgment, as of a date different from the day when judgment was alleged to have been entered; to wit, recite a judgment as entered on the 13th of May, 1820, instead of the 13th of September, 1820; and although no entry of judgment was made upon a larger and cleaner docket, upon which it was as usual to transcribe the entry of judgments from an original or rough docket, as to enter them previously upon the latter docket itself.

If the record shows anything to amend by, the Court may amend its own records at the distance of fifteen years, as in this case, or at any distance of time, without any notice to the parties, and without their presence. The action of the Court in this respect, cannot be questioned by another Court, even upon error.

This last point was the only one *actually necessary* to be decided; but the case having been fully argued on the other points, they were all passed upon by the Court.

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Statement.

THOMAS CROMWELL being seised of a large tract of land near Pittsburg, mortgaged it in fee, in May, 1819, to the Bank of Pittsburg. A *scire facias* (equivalent to the equity bill of foreclosure,) having issued in August, 1820, upon the mortgage, service was accepted by Cromwell, and the writ regularly returned. By the practice of the Court, the entries of all its judgments were first made in a rough or small docket, and then as regularly copied, with care, from it into a clean and larger one; none being copied into the larger, unless first made in the rough one. The large docket contained *no* contemporaneous entry of judgment; and the smaller or rough one being now lost, the only direct evidence of a judgment at all, independent of writs and other papers *reciting* it, was an original paper, *without date itself*, signed by Cromwell, found in the bundle of papers in the case, among the records of the Court, and *indorsed at the time by the clerk, with his signature and date of the* 13*th of September*, 1820. The

paper was properly entitled, and ran thus: "In my proper person, I this day *appeared* before the prothonotary, in his office, and *confessed judgment* to the plaintiff, for $21,740.40, besides costs, with a release of all errors, without stay of execution, and that the plaintiff shall have execution by *levari facias* to November term, 1820. Thomas Cromwell." On the same day, the 13th of September, 1820, on which this paper was filed, the attorney of the bank directed a *præcipe* in the case, properly entitling it by term and number; and adding "scire facias sur mortgage and *judgment*. Issue levari," &c. A levari facias, *reciting the judgment*, accordingly issued; but it recited a judgment as having been entered on the 13th day of *May*, 1820, and not on the 13th of *September;* the day when it was entered, if entered at all. There was a stay-law at this time, in Pennsylvania, but by an indorsement on the writ of *levari*, Cromwell, "the within defendant and mortgagor, acknowledges to have received due and regular notice of the time and place of holding an inquisition and appraisement, and releasing all errors touching the premises." The property was sold in November, 1820, by the sheriff to the mortgagees, the defendants in this case, The Bank of Pittsburg: and a deed regularly acknowledged in open Court. The Bank, having received from Cromwell, in the spring of 1821, full possession, proceeded to sell it out in parcels, as opportunity offered, and had sold it all out prior to 1830. The property—vacant ground when bought by the bank—had now become the site of a large and incorporated village, and was covered with extensive and permanent improvements.

On the 1st of December, 1835–6, some of the pur-

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Statement.

chasers from the bank discovering the state of the record, that the usual entry of judgment did not appear on the large docket, and that the date of the judgment as recited in the levari, did not conform to the date of the judgment which Cromwell appeared to have confessed, Mr. Charles Bradford, who was *their* counsel, took a rule in the Court in which the case was, to show cause why the record should not be amended by the *entry on the docket*, as of September 13th, 1820, *of the judgment which appears among the papers of the case;*" which rule was, after consideration, made absolute. And on the 19th of March, 1836, took another rule absolute to amend the levari facias, "by inserting the 13th day of September, A. D. 1820, instead of the 13th day of May of the *same year, so as to conform to the judgment;*" which rule was also made.(A)

(A) The following was the opinion of the Court, delivered December 14th, 1835, upon the former of these motions:—

Dallas, J. It is apparent on the face of the record in this case, an exemplification of which has been furnished to the Court, that the amendment now desired is rendered necessary, in consequence of the neglect or omission of the prothonotary to enter upon the appearance docket a judgment confessed by the defendant in person, on the 13th September, 1820, which confession was contained in a slip of paper signed by the defendant, and filed with the papers in the case, but never noticed in the docket entries.

The doctrine of amendments has, in modern practice in Pennsylvania, been applied on very liberal principles; the exercise of the power now invoked, generally speaking, tends very much to the promotion of justice. To deny the amendment now prayed for, might be productive of consequences alike as unjust as they would be extensively injurious. There is here something to amend by, and the effect of the amendment is to make that appear upon the docket which the prothonotary ought to have made appear, on the day that the confession of judgment by the defendant was filed.

* 6 Sergeant & Rawle, 126.

The case of *Murray et al.* v. *Cooper, for the Use of Taggart,** argues strongly in favour of the present rule. In that case Chief Justice Tilghman, in delivering the opinion of the Court, says: "But, independently of the statute (17 Car. 2, ch. 8), the Court has power, in order to do justice, to enter judgment at their discretion, as of a past time, when it ought to have been entered. It was so determined in the case of *Griffith* v. *Ogle.*† Perhaps," continues the Chief Justice, "it was through the fault of the prothonotary that it was not entered."

† 1 Binney, 172.

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Cromwell, the mortgagor, having moved away from Pittsburg soon after the sale, died in 1851; never having raised any objection to the proceedings.

It did not appear that notice had ever been given to him of this application to amend the docket or *levari*.

Upon these facts this bill was filed by his heirs to have an account of the rents and profits of the mortgaged premises; and if the mortgage debt, interest and costs, *had not* been fully discharged, then, upon payment of any balance, or, if they *had* been discharged, then without such payment, to have the mortgage cancelled and delivered up, and satisfaction entered on record.

There were several suits of dower on the law side of the Court, dependent upon the same point essentially as one decided as a third point in this case; and by consent the whole matter was made dependent upon the decision of that point here.

For the Complainant.

For the Complainant. The equity and only equity of this case is, that the mortgagee shall have his money and interest upon it, and that the mortgagor shall have his land. This equity—the right to redeem—is a peculiar favourite equity. It is so much an equity that it is called *the equity* of redemption; and it is one which the Courts of Chancery will go very far to encourage, assist, and uphold. Chancery will consider the debt as subsisting until it is regularly foreclosed, and it will even open a regular decree of foreclosure, years after foreclosure, upon grounds strongly conscientious. It will make all presump-

So far as the parties to the record are concerned, it is no more than justice to consider it as entered at the time when they thought it was and intended it should be entered. As to third parties, they are not to be injured. The entry of the judgment, *as of a past time*, will not be permitted to affect their rights.

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Argument. For the Complainant.

tions in favour of the equity, none against it. Least of all will it attempt to support void, erroneous, or even irregular proceedings to destroy it. It looks with suspicion upon even the solemn release by a mortgagor of his equity of redemption; and will not support it unless it were clearly made by one who was quite untrammelled, cognizant of his rights and acts, and who in parting with his equity had received its full equivalent. To imply an *abandonment* of that equity, and to construe beyond its literal operation, and as having the intention and effect of such abandonment, any act of the mortgagor which naturally does or can operate more restrictedly and without such abandonment, would be abhorrent to every principle of equity. It will take the acts and admissions of the mortgagor for what they do or admit; and will not take them, or suffer a hard creditor to take or claim them, one tittle beyond either their action or their language.

In the case now before us, when the bank issued her *sci. fa.* she admitted a subsisting right of redemption. She does not claim under a long possession without being called to account. Her suit is quite inconsistent with such claim. The suit never having been withdrawn or dismissed, it is still open unless she has proceeded to judgment. She claims under a sheriff's sale upon a valid judgment, or she has no claim. And she cannot claim validly, unless the judgment was valid.

Now, no judgment was ever entered. What if judgment might, or could, or ought to have been entered on the dateless paper put away among the "papers of the case?" The answer is, that it was *not* entered. "Judgment is the sentence of the law

pronounced by the Court upon the matter contained in the record." It is not the act of the defendant at all. He may confess a judgment, but he confesses it to the Court, and the Court accepts and records his confession in *its* judgment. It may be in a solemn form, or in a form not solemn, and one form is as good as the other. It may have the "whereupon the matters and record abovesaid having been seen and by the judges here fully understood," &c.; or it may be "judgment," "judg't," or even "J." Language, sign, orthography, is not important. But there must be some language, some sign, some orthography; and being matter of record, it can be proved by inspection of the record only. Suppose an amicable agreement to enter judgment on a fixed day, drawn up and signed by the parties in the most approved form, *meant to be* entered on the record, would it be "a *judgment*," until the Court had exercised *its* action upon it? Would it be, even if the defendant said in express terms, "I hereby *do* confess judgment, and judgment IS hereby entered?" Would this be a lien? Would any prothonotary certify to it as a judgment, till it was entered by the Court or by some officer of the Court, on some roll, or docket, or index, or paper? In this case the dateless paper is in the past tense; it refers to something previously done of record, which the record shows was not done, or does not show was done. *It* does nothing. *It* is no present judgment. It can be no past, nor any future one. It claims that the *admission* of a prior confession of a judgment by a *party*, is an *entry of judgment by the Court*. The docket being shown to be lost, but it not being shown at all what that docket contained, the paper amounts at very best to but parol proof,

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without grounds laid for parol proof, that a judgment was confessed. This is a matter not to be proved by parol at all, unless there be ground laid in prior proof that a record of judgment once existed, and has now been lost. Suppose any person, after this paper had been signed and filed, had, *bonâ fide* and for value, and after an inspection of the dockets, rolls, and minutes, and search there for entry of judgments, without finding any, bought this land as free from the lien of any judgment, would such purchaser be affected? Certainly not. The bank might have its action against the prothonotary on his official bond for his not having done his duty, but the land would be free of everything but the mortgage itself. None of Cromwell's papers or confessions aid this case in the vital point. His statement, drawn up by opposite counsel and signed by him, that he had confessed judgment, is of no force, except to prove that a judgment *had been entered by the Court*, and as evidence of that it is outweighed by the fact that no such entry is found on the large docket, where, according to course, it would be. If really no judgment was entered, then his admission that he confessed one comes to nothing. *It* don't enter it. And in regard to his waiver of inquisition and appraisement, it amounts to nothing beyond what it professes to be, a waiver of "notice of time and place of inquisition and appraisement." The law would give it no further effect. Equity will not go beyond law, to the injury of a mortgagor offering back all the money and years of accumulated interest. Was it Cromwell's duty in addition to all he had done, to see that the judgment which he had confessed, was entered to authorize the *levari facias?* Had the

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Argument. For the Complainant.

power ever been vested in him or any other person in Pennsylvania, to validate process and pass titles to land, against the spirit and policy of the law? Does he now complain of the want of regularity of notice, or repudiate a single act of his?

Mr. Charles Bradford's entry *nunc pro tunc*, don't help the case, but makes it worse. It shows that there was no judgment on the record, in other words no judgment at all, while it shows how absolute was felt to be the necessity of one. His *application was not to mould the judgment into technical form.* Such a form it has never had. That being *mere* form, may always be considered as already done. What he sought was to give it substance. And how does he do it? He ingeniously takes a rule to show cause why the *record* should not be amended by the entry on the *docket*, of the judgment among the papers. The docket *quoad hoc, is* the record. And the motion is, therefore, to enter judgment on the record, from the judgment among *the papers*. Judgment among the papers! Who ever heard of a judgment among *papers*, as distinguished from judgment on the record? Independent of which there was no *judgment;* no act of the Court or prothonotary—on the papers. That we have shown. Then Mr. Bradford appeared for neither party originally or now in interest. And if he had appeared for both, and we should concede the validity of the judgment as respects sales made after its entry, *nunc pro tunc*, how is it to infuse into it that retroactive vitality requisite to support a sale anterior to it?

The Court's Opinion.

Grier, J. Assuming, for the present, the truth of the complainant's assertion, that the record in

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The Court's Opinion.

evidence does not show a legal judgment as foundation for a writ of *levari facias*, have the complainants shown themselves entitled to a decree on the other facts of the case?

1st Point. Equitable relief in favour of delinquent mortgagors. Time.

On this assumption, their case stands thus: The mortgagee takes possession of the mortgaged premises, claiming to be the owner of the equity of redemption, and of an indefeasible estate in fee. The mortgagor, not disputing the validity of his claim, delivers the possession. The mortgagee and his vendees remain in possession, claiming the absolute fee for thirty years, rendering no account to the mortgagor, and denying his right to any, or that there is any subsisting trust, or privity with the mortgagor. Will equity, under such circumstances, decree an account, or interfere with the legal title of the mortgagee? Certainly not. It is a settled rule of equity, that, "if the mortgagor permits the mortgagee to hold possession for twenty years without accounting, or without admitting that he possessed the mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it previously was at law."* Chancery will not interfere in favour of the mortgagor after twenty years, where the entry of the mortgagee was equivocal, or only under his defeasible legal title, and where no account has been rendered or demanded, or other acknowledgment of privity, trust, or subjection to the claim of the mortgagor; much less, when the mortgagee claimed and the mortgagor admitted the equity of redemption to be foreclosed, and when the purchasers, for a full consideration, from the mortgagee, have been in possession, making valuable improvements, claiming adversely to all the

* 2 Story's Equity, § 1028 a, &c.

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1st Point. Equitable relief in favour of delinquent mortgagors. Time

world for more than twenty years. For if, after such a great length of time, it should be discovered that there was some informality or irregularity in the proceedings intended to foreclose the mortgage, and for which the sale for that purpose might have been avoided; instead of being a reason why equity should interfere in favour of the mortgagor, it is the most conclusive reason to the contrary. It proves the very facts to exist, which equity presumed to exist from length of time alone; to wit, that the mortgagee did not hold in trust, or in privity with, or subjection to, the rights of the mortgagor.

But if length of time and the staleness of the complainant's claim, were not, of themselves, a conclusive objection to it, does not the case show acts and conduct of Thomas Cromwell, which should operate as an equitable estoppel to the claim now advanced?

Let us suppose a bill filed by the mortgagee to foreclose the mortgage, and that the mortgagor (knowing that the land is not worth the money secured on it, and his equity of redemption is worthless,) makes no objection to the foreclosure and sale, but instead of filing an answer to the bill, agrees with the mortgagee to expedite the sale and waive all matters of form; that he signs a written acknowledgment to be filed of record, admitting that the whole amount of mortgage money is due, and agreeing that a master may proceed to sell the premises immediately in discharge of the mortgage; that he waives a valuation; that he delivers up possession to the purchaser; that he stands by, without objection, and sees purchasers for large and valuable consideration, expend large sums in improvements, on

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The Court's Opinion.

1st Point. Equitable relief in favour of delinquent mortgagors. Equitable estoppel.

the faith of the title thus acquired. Would a Court of equity, under such circumstances, entertain a bill for an account, and treat the purchasers as trustees for the mortgagor, on the plea that he has since discovered a flaw or irregularity in the proceedings, and that there was no formal decree of the Court foreclosing the mortgage? Surely it would not; and I need not attempt to fortify the assertion, by a reference to the very numerous cases to be found both in law and equity reports, on the subject of *estoppel in pais*. Yet the hypothetical case I have stated, is the one substantially before us. Cromwell gave his written assent to the sale, and assisted to expedite it, and thus encouraged purchasers to believe they obtained an indefeasible estate. He cannot now be permitted, in a Court of equity, to assert the defect of title.

2nd Point. The existence and evidence of a judgment.

II. Thus far we have considered this case on the assumption, that the allegation of the bill, which is the whole foundation of the complainant's claim, is true; to wit, that the record of the proceedings on the scire facias show no judgment to support the writ of *levari facias*, and that the sheriff had no legal authority to sell. But the truth is, that this allegation of the bill is unfounded in fact. And the case shows:

1st. That even without the amendment of the docket, made in 1836, there is sufficient record evidence of a judgment.

2nd. That, if it were absolutely necessary to the validity of a judgment that it be recorded in a book or docket, there is sufficient evidence that such a docket record was made, and is now lost or destroyed.

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3rd. That the amendment (though not strictly necessary,) was properly made, and being made, is absolutely conclusive between these parties.

The Court's Opinion.

2nd Point. The existence and evidence of a judgment. Pennsylvania Records.

It would lead to absurd and mischievous conclusions, if we should attempt to test the validity of the records of the Courts of Pennsylvania, by a comparison with those of the King's Bench and Common Pleas in England, or those, perhaps, of several of our own States.

In early times, one of the justices of the Court had possession of the seal, signed all writs and judgments, took bail, and performed all the functions of the prothonotary. This continued to be the case till the adoption of the new constitution in 1790. After that time, and till the present constitution was adopted, the prothonotary was appointed by the Governor; now he is elected by the people.

The Judiciary Act of the 13th of April, 1791, provides that these "prothonotaries shall have the like power to sign all judgments, writs of process, &c., as they had for those purposes, when they were justices of the Court."

Since that time the prothonotary has exercised many *quasi* judicial functions. Parties appear before him and confess judgment *ore tenus*, in vacation or at any time; or it is entered upon a precipe, or written order from the party; or on a general power of attorney, or *any other* acknowledgment or agreement of the party to confess a judgment, whether written in the present or preterite tense.*

But these prothonotaries, notwithstanding they exercised such large powers, were too often appointed or elected without any regard to their capacity to per-

* Cook v. Gilbert, 8 Sergeant & Rawle, 568; McCalmont v. Peters, 13 Sergeant & Rawle, 196; Reed v. Hamet, 4 Watts, 441.

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2nd Point. The existence and evidence of a judgment. Pennsylvania Records.

form the duties of their office. Wholly ignorant of law and legal forms, they became a law unto themselves. There was no system, rule, form, or precedent adhered to. Judgments were seldom or ever signed by clerk or judge. No judgment roll or record proper is ever engrossed. Minutes of the acts and judgments of the Court are made sometimes by the clerk in the minute book of the term, sometimes by the judge on the trial list, or in the rough docket, or indorsed on a case stated, or declaration, or other paper on file. Generally a large folio docket is kept, into which these minutes, whether found in the rough docket, book of minutes of Court, trial list, or elsewhere, are collected and copied in a fair and legible hand. This duty is usually performed after every term, with more or less attention to accuracy and correctness, but often with many and important omissions. But all these entries, whether found in this docket or not, are but the minutes from which a formal record *may* be made, but in fact never *is* made. They are made as brief as possible, and are mere short hand intimations of what the record ought to be when drawn out in form. For the purpose of notice to purchasers, as regards liens, a minute of the judgment must be made in a certain docket called a judgment docket. But the want of this registry does not affect the judgment *inter partes*. None of these dockets has any title to be called *the record* of the Court. Minutes of the acts of the Court found in the trial or argument lists, in the handwriting of the judge, or indorsed on a case stated, or any other document or agreement of the parties or their counsel, filed in the suit, furnish as proper materials from which to draw out a proper technical record, as the

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short minutes copied into the folio docket. These minutes, whether made by the judge, the clerk, or an attorney, are always brief and informal; usually, the word "*judgment*," connected with the date and amount, or "*judgment for sum due*," leaving the clerk to compute it, is all the actual record that is made. When judge of the State Court, I have entered many thousands in that way, and never signed one drawn up in legal form. The "*ideo consideratum est*" of a formal record of judgment, is nowhere to be found. When a defendant is willing and desirous to confess judgment, he may do it on the back of the writ or *narr.*, or by any other paper put on file; or he may come in *propria persona* before the prothonotary. There is no given form for such writing, or for the mode of recording the fact. Usually, when an agreement or acknowledgment, such as is found in this case, has been put on file, the entry made by the clerk on the rough docket would be, "*Sept.* 13, 1820, *judgment confessed, see paper filed with writ;*" a more careful clerk would transcribe the substance of the agreement; and a *very* careful one would have written out a copy on the rough docket, and have required the party to sign it. And I have known one prothonotary (a very worthy man, but somewhat eccentric in his orthography) who would have made the following minute only, "*Cept.* 13 *gug*t." Yet with this paper on file to show the amount and terms of the judgment, and with the help of which a formal record might have been drawn up, no lawyer acquainted with the practice and records of Pennsylvania, would venture the assertion that there was no judgment.

In *Prine* v. *The Commonwealth*,* the late Chief

* 6 Harris, 103.

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The Court's Opinion.

2nd Point. The existence and evidence of a judgment. Entry in Docket unnecessary.

Justice Gibson complains that the same laxity and disregard of legal forms are to be found in criminal cases. "Our looseness," says he, "in recording forms of procedure, especially in criminal cases—*if we have any forms left*—has grown till the knowledge of the principles of which they were the exponents has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder."

A certified copy of the docket entries, is not legal evidence of a record. All the papers on file with their indorsements are as much entitled to that name.* A clerk who understands his business and duties, could use these documents and memoranda, whether on the docket or on file, as a frame on which to construct a formal record, with all the verbiage to be found in Saunders's Reports, or the Appendix to 3d Blackstone's Commentaries. If the Court in this case had refused to receive (as they might well have done) the docket, memoranda, and other papers read without objection as *record*, and required a formal record certified under the seal of the State Court, the prothonotary would have been justified, nay, bound, to certify a judgment in the case as entered on the 13th of September, 1820, by confession or *nil dicit*, with the "*ideo consideratum est*," and any and all other terms of art to satisfy the formalist. The confession of judgment on file in this Court, is itself the original, and as much a part of the record or minutes, from which a formal record may be made, as any other paper or docket memorandum in the case. The amendment of the docket made in 1836, was in fact superfluous and unnecessary as between the

* Leveringe v. Dayton, 4 Washington's Circuit Court Reports, 698.

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parties to the judgment. It was an amendment of the docket, not of the record. The omission of such registry being a palpable oversight or neglect of the clerk who copied the minutes of the record into that docket, it could be remedied at any time by the clerk, even without an especial order of the Court to authorize it.

2dly. Assuming that a registry of the minute of judgment in a docket, is absolutely necessary to its legal existence, there is no law which requires it to be made in a large and not in a small docket; in a folio bound in Russia leather, and not in a common bound rough docket; or that the original would not be as good record evidence, if it was in existence, as a copy. The omission of the clerk to copy the entry of judgment into the larger docket, would not invalidate it. The course pursued by the prothonotary, of making the minutes and entries first in the rough docket, which is now lost, leaves it altogether probable, if not certain, that the only omission of duty has been a neglect to afterwards copy it into the folio docket. But this presumption is *legally conclusive*, when connected with the other facts of the case. The written acknowledgment on file; the recital of the *precipe*, "scire facias sur mortgage and *judgment*. Issue levari;" etc., the writ of *levari facias*, reciting a judgment; the indorsement by the defendant Cromwell on the writ; the sale made with the concurrence of the defendant, remaining unquestioned by him during his whole life, and for the space of thirty years. These facts can leave no doubt that the lost docket contained a record of the judgment on which the writ of *levari facias* and sale by the sheriff were founded. If, after such a length of time, titles could

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be called in question for want of some writ, docket, or other memorandum, no man's property in Pennsylvania would be safe; and more especially would this be the case in Pittsburg, where process of execution on which valuable titles depend, is often found among the papers of deceased attorneys and sheriffs, who have sometimes removed to near or to distant places and States, and where the archives of the Court are treated as useless lumber.* The case of *Shaw* v. *Boyd*† would have been without difficulty, if any paper on file had shown that a judgment had been entered, as in the present case. There, on the issue of "*nul tiel record*," the Court presumed that a judgment had been entered in 1820, from lapse of time and other circumstances. "The probability is," says the Court, "that judgment was entered *on the back of the paper containing the case stated*, or special verdict. That paper is now lost or mislaid, and cannot be found. Strong presumptions are tolerated and allowed in favour of records irregularly kept, after a great length of time."

* See Note, p. 589.

† 12 Pennsylvania State, (2 Jones,) 215.

2nd Point. The existence and evidence of a judgment. Omission to docket, a clerical misprision.

3dly. Assuming it in the last place to be absolutely necessary that the entry of judgment should be copied into the folio docket, in order to give it validity; the omission to do so is a clerical error or misprision, which may be amended at any time; and the amendment when made is conclusive, and cannot be denied or questioned in a collateral suit.

A Court may possibly not have the power to alter or vacate its own judgments truly recorded, after the term to which they have been entered. But that any misprision, omission, or mistake of the clerk may be amended *at any time*, where the record shows anything to amend by, has never been doubted since

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the statute of 1 Edward III. c. 6. It is a power vested in every Court, and one which it is their duty to exercise in a proper case, in order that suitors may not suffer by the carelessness or mistakes of clerks and officers. It is a power committed to the discretion of the Court, to be exercised over their own records, and the correct use of that discretion cannot be questioned by another Court, even on a writ of error. The jurisdiction of the Court does not depend on the consent or presence of the parties to the suit, but on the power of the Court over its own records. A record is received as absolute verity, and it is the duty of the Court to see that it speaks the truth and the whole truth. If the amendment made is according to the truth, the parties have no right to complain. If it be alleged that the amendment was ordered on a false suggestion, the party making such allegation should apply to the Court to vacate or set aside such order for that reason. The Court of Common Pleas of Alleghany county having decided that a judgment was confessed by Cromwell on the 13th of September, 1820, and that it should have been entered by the clerk on the docket, and having ordered that omission to be amended *nunc pro tunc*, it is conclusive evidence to this Court that such a judgment was rendered or confessed on the 13th of September, 1820. The complainants in this case cannot question its propriety or deny its effects.

The case of the complainants, taken as a whole, is therefore without foundation, either in fact or in law.

The doctrines which I have just stated are supported to their fullest extent by precedent. I need refer but to few to be found in the reports of Pennsylvania.

In *Maus* v. *Maus*,* the Court say, "It is never too

* 5 Watts, 319,

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late to amend the record merely for the purpose of correcting a misprision of the clerk." In *Owen* v. *Simpson*,* it is decided, "That not only has every Court the power, but it is its duty to amend a clerical error which stands in the way of justice, and when it is evident the defect was produced by the blunder of the prothonotary. To suffer the misprision of a clerk to destroy the title of a purchaser, with such materials for amendment, would be inconsistent with the liberality which is so conspicuous a feature of the day."

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* 3 Watts, 87.

† 6 Sergeant & Rawle, 126.

In *Murray* v. *Cooper*,† a judgment given in 1808, was neglected to be recorded; and in 1816, the Court amended the record by ordering a judgment to be entered as of August term, 1808. On error brought to reverse this amendment, the Supreme Court decided that it was not the subject of review on a writ of error, and say, "The Court has power, in order to do justice, to enter judgment at their discretion as of a past term when it ought to have been entered. They exercised that discretion; they had a right to do so, and *we* cannot say they have abused it." In *Wilkins* v. *Anderson*,‡ a memorandum found on an old trial list, in the handwriting of the judge, was considered sufficient record evidence that a person was substituted as defendant, where the docket entry of the verdict and judgment and the other papers in the cause, showed another person as the defendant. And the Court say, "This entry on the trial list *being among the archives or monuments from which a record may be made at any distance of time, the record might be amended.*" In *De Hass* v. *Bunn*,§ the Court say, "It is only by patching up errors in matters of mere form arising from inexperience consequent on the

‡ 11 Pennsylvania State Reports, 399.

§ 2 Barr, 339.

popular principle of rotation in office, that we can hope to preserve the substance of justice." In *Rhoads* v. *The Commonwealth*,* the Court state it as "a plain legal truth, which ought not to have been brought in question, that the Court having the power to amend, the regularity of the amendment cannot be inquired into collaterally." So also in *Sickler* v. *Overton*.†

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The Court's Opinion.

2nd Point. The existence and evidence of a judgment. Authorities showing right to order Docket Entry at any time.

* 3 Harris, 272.

† 3 Barr, 325, and see 7 Sergant & Rawle, 180.

These are but a few of the cases on this subject; and an examination of them will show amendments of clerical omissions and misprisions, "reconstructions of the whole fabric of writs," presumptions of records, far beyond any charity which need be invoked to hide the omission in this case, so easily corrected, and afterwards actually and conclusively amended. Much of the most valuable property in Pennsylvania has gone through the hands of the sheriff, and nearly all through the Orphans' Court more than once. In most of these cases the titles now depend on the preservation of loose papers and other documents by officers selected too often with little regard to any principle save that of rotation; whereby skill and experience are often superseded by ignorance and incompetency.

BILL DISMISSED, WITH COSTS. (A)

(A) The evidence given in the case presents somewhat vividly the manner in which records are occasionally kept in Pennsylvania. A witness who had been employed to hunt up all the evidences of judgment entered in the original suit against Cromwell, testified as follows:

"At the request of the solicitor for the respondents in this case, I proceeded to the top of the court house, and in a space surrounding the base of the cupola, amidst a quantity of old Acts of Assembly thrown negligently down into the space, I found a number of old papers, apparently belonging to the Prothonotary's office, and a number of old, rough, appearance dockets. I returned twice afterwards, took a candle, went down into this space, and made a most thorough search. I handled every paper and docket that was there. Some of these dockets went as far back as 1789, or farther: and some came down as late as 1836.

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They were in a damaged condition, dirty, and apparently thrown away as useless. The docket of 1820 I could not find. The nearest I came to it was the one of 1821. I also made an examination in the prothonotary's office, and was unable to find it there. There were entries of judgments, and confessions of judgments, on these dockets."

This carelessness of records is not peculiar to *western* Pennsylvania. For many years past, it has been known to autograph hunters in Philadelphia, that a vast number of ancient, curious and valuable papers were piled carelessly about the loft over the Supreme Court room of the State, at the south-east corner of Sixth and Chestnut streets. They were in truth the records of the criminal courts and Court of Common Pleas of Philadelphia, and of the Supreme Court of the State, from the very earliest date until comparatively recent times. Through the zealous diminutions of them by members of The Historical Society of Pennsylvania and other curious persons, they have now in a large degree passed into public or private collections.

The history of their removal to the loft, was not the least interesting part of their history. It appeared that they had been taken from their proper repositories some years since, to make room for coming and anticipated records of a later date, and put into one of the *cellars* of the public buildings. The cellar being wanted as a place to confine vagrant dogs, the records were *carted* round to the Hall above mentioned, and taken in barrows and baskets up two pair of stairs, where they were pitched down negligently about the loft of the building. Being dry, they were found quite useful for some time in kindling various fires in the Court rooms about the building; but the building itself having taken fire one day, the value of them for this purpose, was impaired by the city hose having been allowed to empty the issues of several fire-plugs for some hours upon them.

More recent times have probably not improved the matter. An acquaintance suggests to me a case well remembered at the bar of Philadelphia, which had been several times taken to the Supreme Court in banc, on various points, all charged or chargeable to the loss of an original record. The case got so bad at last, and, from the loss of the papers, was such a stated source of intemperate vexation and dispute, that it was becoming the plague of every body who had any thing to do with the Court. One day, in 1850, when matters had got to a pass which defied all possibility of any settlement, and the thing was expected to make fine matter for a summer's morning, the record was found—inside of *the stove*. Mr. Ingraham, as *amicus curiæ*, informing the Court, that the inside of the stove was a place where it was well known that many records were put *in winter*; but that, until the recent discovery, it was generally supposed that a different disposition was made of them in summer.

Lest our English brethren should suppose that this carelessness of judicial records is confined to America, let me mention for their benefit, that the same negligence prevails among themselves. In a summer ramble in 1850, through the interior of England, I accompanied a relative, eminent for his taste and pursuits in architecture, through the upper parts of the *Sheldon Theatre*, at Oxford. On our way through its lofts to examine the joints and beams of its curious cupola, my eye was caught by baskets of records placed about the floor; which, I ascertained from our guide, were records of some kind from the English Courts. The city library at Philadelphia, contains two huge volumes of original papers, communications from the privy council and warrants from the king himself to the Lord Lieutenant of Ireland—many of these last apparently connected,

not remotely, with the titles of landed estates in Ireland; and I am, myself, the owner of an original record of the English Chancery, sold, with a great number of similar things, at auction in Philadelphia, for a few cents; and valued only as containing a noble illustration alike of Lord Hardwicke's well known autograph and of his intelligence and decision in Chancery decrees.

GALLATIN & WOOD V. THE PILOT.

[LIEN OF PART-OWNERS FOR SEAMEN'S WAGES.]

[EFFECT OF SHERIFF'S SALE ON IT.]

The lien for wages of a seaman, who is himself a part-owner of the vessel on which he serves, is discharged by a sheriff's sale of her, on execution against her owners. And this, although as a general principle, a sheriff's sale of a vessel does not discharge the sailor's lien upon her.

The decision of the case by the District Court, reported as *Foster* v. *The Steamboat Pilot*, 1 *American Law Register*, 403, deciding otherwise, is not law, and is here overruled.

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STATEMENT.

THE steamer Pilot, navigating the Western rivers, was the property of Gallatin, Wood, and several other persons. The boat was navigated for joint profit; *Gallatin acting as first mate, and Wood as second mate*—it being quite a common custom on the Western rivers, for part-owners to assist in navigating their own vessels. As part-owners and *quasi* partners in the transactions of the boat, they became indebted to several persons, who recovered judgment at common law, in the State Courts, against them; and on one of these, *the vessel was sold at sheriff's sale as their joint property*. While the vessel was under execution, Gallatin and Wood, who are the plaintiffs in this suit, libelled her in the admiralty for wages, *as part of the crew;* they having, as already stated, acted as her mates. And the case coming on, after the sheriff's sale, to be heard, the purchaser at that sale intervened, and, conceding the existence of the services, denied the right of the libellants thus to recover on their lien; which right was the question now before this Court. Notice had been given by the libellants, at the sheriff's sale, of

their claim to have a lien. No exhibition was made here of the state of accounts as between the owners of The Pilot.

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Mr. *Shaler*, Mr. *Stanton*, and Mr. *Hamilton*, for the purchaser, admitting fully the law as stated in *Taylor* v. *The Royal Saxon*,* that as a general principle, the lien of sailors' wages is not discharged by a sheriff's sale, submitted,

Against the lien.

* 1 Wallace, Jr., 324.

I. That *part-owners* have no lien for wages, as mariners; or, at most, that it could exist only *inter sese*, and could not be exerted adversely to creditors or third parties.

II. That by the sheriff's sale, all the interest of Gallatin and Wood, the libellants, whether as owners or by special lien for wages, had passed to the purchaser at sheriff's sale, and that against him the Court would not set up a claim for wages.

Penny, contra. The navigation of the western rivers by steamboats, being attended with unusual risk, it is usual for capitalists building or owning boats, to unite with them as part-owners, one or more persons known to be skilful and trustworthy mariners, whose interest in the vessel, though generally small, is sufficient to ensure a vigilance, which could not be expected of mariners bound to duty only by the prospect of ordinary wages. It is an excellent public policy, calculated to elevate the character of mariners, both in its requirements and its effect. And it does no harm to creditors, since it adds nothing to the wages which must be necessarily incurred in the voyage. The practice, therefore, deserves encouragement from the Court. And why

For the lien.

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shall it not be encouraged? Is a seaman less a seaman, if he works the vessel, because he has some property; or because that property is an interest in the boat he navigates? Why is his lien as against other persons, less sacred than the lien of his fellow sailor, who has no such interest? Third persons know, as of course, that the vessel is bound for all seamen's wages. Why introduce an exceptional case? no policy of law, no motive of natural justice calling for it.

The owners had liens *inter sese*. *Doddington* v. *Hallet*,* decided by Lord Hardwicke, settled that. The Chancellor there gave one party, who had paid the debts of the boat, a lien against the share of his deceased associate owner. The consequence of doing otherwise, he said, would be, that while one partner had paid all the creditors of the boat, other creditors of the other partner, "would run away with what the plaintiff laid out and expended, which the Court would avoid and prevent." Independently, therefore, of a maritime lien for seamen's wages, Gallatin and Wood had liens on the vessel, as respected the other owners, for money due them in account for services. A sale of any kind for value, without notice, we may concede, would discharge such a lien; but here there was an express notice of a claim of lien: and the claimants still have their equity to be paid. In a recent Ohio case,† the Supreme Court of that State were inclined to say, that the better opinion, as well as the weight of authority, was in favour of the lien.

* 1 Vesey, 497.

† McDonald v. Black, 20 Ohio, 198.

It is not true, that the libellants, Gallatin and Wood, were liable for all the debts incurred by the other owners of the ship. Persons navigating a ship,

are tenants in common, and not joint-tenants or partners. This is the law as laid down by Chancellor Kent, in the leading case of *Nicoll* v. *Mumford*.*

* 4 Johnson's Chancery.

Reply. I. *As to the lien inter sese.* *Doddington* v. *Hallet*, decided by Lord Hardwicke, was overruled, after much consideration, in *Ex parte Young*,† and *Ex parte Harrison*,‡ by Lord Eldon; who decided that part-owners of a ship are tenants in common, not joint-tenants; and therefore that no lien on the share of one, a bankrupt, who had been managing-owner, freight, &c., was due to the others: and Chancellor Kent, in *Nicoll* v. *Mumford*, reviewing the law on this point, presents Lord Eldon's as the true view. Not being partners, therefore, there could be no lien *inter sese*. And if there was such a lien in law, it don't appear by any facts shown in this case, that on a settlement of joint account, the balance would have been in favour of the libellants. Whether or not, certainly a sheriff's sale on execution against *all the owners*, must discharge any lien one has against the other.

Reply against the lien.

† 2 Vesey & Beames, 242.

‡ 2 Rose, 76; and see Ex parte Gibson, 1 Montagu on Partnership, 102, n.; and Ex parte Parry, 5 Vesey, 575.

II. *As to the absence of liability in solido.* This position is fatal to the former one of *lien inter sese*, which could arise only among *partners*. The doctrine of *Ex parte Young* and of *Nicoll* v. *Mumford*, decided by Lord Eldon and Chancellor Kent, and which establish tenancy in common, as distinct from joint-tenancy or partnership, overrules *Doddington* v. *Hallett*, which established lien *inter sese* only as a consequence of previously establishing that the owners are *partners*. The two positions assumed on the other side, cannot therefore co-exist.

III. But whatever may be the relation of the

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Reply.

owners of vessels, strictly speaking, this boat was navigated for joint interest, and the debts arose from the transactions of the boat in these voyages. Certainly as to her *voyages*, the owners were partners, whatever they might have been as to the boat herself. In fact none of the points considered in the three cases cited, properly arise here; for the vessel was sold on an execution against all parties.

The bare question is, whether the owners of a vessel can take her away from their own creditors? Whether, by mortgaging her to themselves, they can defeat the claims of those who are entitled to all their property?

The Court's Opinion.

GRIER, J. How far one owner might claim a lien against the share of another, for advances made, labour done, or any balance of account as between themselves, when the other partner sells his share, or becomes bankrupt; or whether, in such a case, this Court will adopt the doctrine of Lord Hardwicke,* who decided that he has, or the doctrine of Lord Eldon,† who overruled Lord Hardwicke, and decided he has not, are questions not arising before me; for the accounts of the partnership, or how the balance stood among the partners, makes no part of the case.

* Doddington v. Hallett, 1 Vesey, 497.

† Ex parte Young, 2 Vesey & Beames, 242.

A sale by the sheriff confers all the title which the defendants in the execution have, and is equivalent to their own deed with special warranty.

The case, then, presents this bare proposition—can a vendor for a consideration paid, retain a lien against property which he has thus sold and delivered, in the hands of his vendee: and that, too, for a debt due *by* himself *to* himself? Certainly he can-

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The Court' Opinion.

not; for where a chattel is sold and delivered to the vendee, the vendor has neither *jus in re*, nor *ad rem*; neither property *in*, nor lien *on* the thing sold. Admitting that there was, as between the partners, a balance in favour of the libellants, and that it would have been a lien *inter sese*, how could we maintain such a lien on a boat sold by themselves with special warranty? A tailor who makes a coat for customers who furnish the cloth, has a lien upon the coat while in his possession, for the price of his labour: but assuming the lien to continue even after a change of possession, it would be an absurd application of the doctrine, to say, that where A. & B. are in partnership, and A. furnishes the cloth and B. makes the coat, and both join in a sale of the coat, that B. has a lien for his labour as mechanic, on the joint property sold.

The assumption that part-owners, when navigating a boat for their joint interests, are not liable personally, or *in solido*, for repairs, wages, provisions, &c., furnished to the vessel while trading, or earning freight for their joint profit, is entirely without foundation in law.* The dictum of Chancellor Kent to the contrary, if he ever made one to the contrary, in *Nicoll* v. *Mumford*,† has been overruled by the Chancellor himself.

* Flanders on Shipping, § 381.

† 4 Johnson's Chancery, 522.

The libellants, we think, therefore, cannot, to suit their purposes, shift their characters as mariners and owners, so as to retain a claim on their own vessel for their own wages, after they have sold it for value; or, what is the same thing, the sheriff has sold it for them. They cannot sell their joint property, and charge the purchaser with a balance of

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accounts between themselves as co-tenants or co-partners.

DECREE REVERSED, AND NOW MADE IN FAVOUR OF DEFENDANTS, WITH COSTS.

[AT PITTSBURG, NOVEMBER TERM, 1853.]

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ABANDONMENT IN ADMIRALTY.

1. Where a vessel is injured and sunk by collision in such a place, or under such circumstances, that for a small sum of money in comparison with the value of the vessel and cargo, she can be raised and repaired and the cargo recovered with slight damage, her owners have no right to abandon her and claim for a total loss. *Clarke* v. *The Steamer Fashion*, ... 339
2. The doctrine of abandonment as connected with cases of insurance, has not been imported into Courts of Admiralty. *Id.*

ADMIRALTY.

1. The Pennsylvania Pilot Act of 29th March, 1803, which "obliges" vessels going out of or coming into the port of Philadelphia to receive a pilot, under a "penalty," and "forfeiture" of half-pilotage, which the act makes a lien upon the ship, and recoverable in the Admiralty, not being, as is decided, compulsory, but optional, the ship need not take a pilot, if it prefers to pay the penalty or forfeiture. Hence, there being a direct privity between the pilot and the ship, the latter is liable in Admiralty for damage caused by his acts. *Smith* v. *The Creole and The Sampson*, ... 485
2. See ABANDONMENT IN ADMIRALTY, 1, 2.
3. The lien for wages of a seamen, who is himself a part-owner of the vessel on which he serves, is discharged by a sheriff's sale of her, on execution against her owners. And this, although as a general principle, a sheriff's sale of a vessel does not discharge the sailor's lien upon her. *Gallatin & Wood* v. *The Pilot*, 592

AGENCY.

Where a larger vessel—a ship—is in tow of a small one—a steam tug—the latter is in law regarded as the servant of the former; and being thus its agent, and so bound to obey its orders, is not responsible for damage in the proper course of the employment. *Smith* v. *The Creole and The Sampson*, ... 485

AMENDMENT OF RECORD.

See RECORD.

ASSIGNMENT, GENERAL.

1. A general voluntary assignment, valid by the laws of one of the United States—though assumed to be void if it had been made in another—will carry property in that other against an attaching creditor there. *Caskie* v. *Webster*, . . . 131
2. The case of *Ingraham* v. *Geyer*, decided A. D. 1816, in the Supreme Court of Massachusetts, in which an opposite doctrine was held, is not law. *Id.*

ATTRACTION OF TITLE.

It being admitted that a devise of real estate to which, *at the date of the devise*, the testator had not a good title; but of which nevertheless he had an actual, notorious and continuing possession, and one that by time might have ripened into title, and under which possession and pretence of title he claimed entire ownership, does not carry the estate as real estate owned at the date of the will; the

ATTRACTION OF TITLE—*continued.*

Court here further decides that *a good title* acquired *subsequently* to the date of the devise, will not be attracted nor cohere to the old claim or imperfect interest, so as to be merged, or extinguished in it, and so to pass the estate as real estate acquired *previously* to the date of the will. *Girard's Heirs* v. *The City of Philadelphia*, ... 301

BILL OF PEACE.

After a question of title to lands in Pennsylvania, has been, *in substance*, three times before courts of competent jurisdiction, all of which have been of opinion against it—an opinion which this Court, also, on understanding it, concurs in—this Court will enjoin further proceedings at law, and compel the party claiming under such title to give up the evidences of it, and to make a deed of all his estate derived under them to the party whom he has been vexing. And this though the title alleged in the first suit was not formally the same as that in the second, and though in the third, the plaintiff by suffering a nonsuit, prevented a verdict and judgment against him at all. The Pennsylvania Statute of April 13th, 1807, enacting that "two verdicts" and judgments thereon, in succession for the same party, in ejectment between the same parties, shall 'bar the right,' was intended to supply a want of equitable power in the Pennsylvania courts, as then constituted; and whatever it may mean, does not prevent this Court, which has complete equity powers, from giving complete equity relief in such a case as is above stated. *Craft* v. *Lathrop*, ... 103

CAPIAS AD SATISFACIENDUM.

Where one, having arrested his debtor defendant on a *ca. sa.*, sets him at liberty on certain terms, at *his* instance, it being "expressly acknowledged" by the defendant that this is done "for *his* accommodation, *without any prejudice whatever* to arise to the plaintiff's right by the enlargement" as aforesaid, "or *otherwise howsoever*;" the debt is paid at law. No further execution of any sort can be issued there. And the agreement having been drawn and signed by the plaintiff's own attorney, a learned and able counsellor at law, a Court of Equity will not interpose to enjoin the defendant from pleading this discharge as payment, by allegations in a bill *demurred to*, that there was either a mistake common to both parties as to the effect of the agreement; or else that the plaintiff not knowing its effect, while the defendant did know it, it would be a fraud in the defendant now to profit of the plaintiff's misconception or ignorance of what he was doing; and set up at law the payment by his liberation on the *ca. sa.* *Magniac* v. *Thomson*, 209

CHALLENGE OF JURORS.

1. One who being summoned as a juror in a case, where treason was charged to have been committed—stated, on being challenged, that he had read the newspaper accounts of the facts at the time, and come to his own conclusions—*had made up his mind*, that the offence was treason, though he had not expressed that opinion, —nor apparently formed nor expressed an opinion that the defendant was or was not engaged in the offence—is incompetent to sit as a juror. *Walsh's case*, 143
2. One who has formed a conditional, but not an absolute opinion on the law of treason: e. g., who says he can't understand how treason can be committed against the United States if such and such facts do not constitute it, is competent to sit as a juror, if he says that, on being instructed by the Court, that the opinion is erroneous, such opinion will cease to influence him as a juror. *Reynolds's case*, 145
3. The prosecution have no right to ask a juror, whether he has *so* made up his mind [on facts?] as that *it could* not be altered in the course of a trial; there being no obligation on the prisoner to take upon him the burden of changing the juror's mind to the extent, that even if this question were answered negatively, he might have to do it, to procure an acquittal. *Whitman's case*, ... 147
4. One who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged," is competent. *Brinton's case*, ... 149
5. One who had 'certainly expressed an unfavourable opinion towards the course of these gentlemen,'—that is a party of persons with whom the prisoner agreed in opinion; the person summoned being sensible of no such bias as would affect his action as a juror; having neither formed nor expressed any opinion as to the guilt or innocence of the prisoner, or of the other persons charged to have participated with him in the offence; not presuming to be a judge whether the offence was treason; knowing none of 'these gentlemen' individually, and meaning to

CHALLENGE OF JURORS—*continued.*

express nothing more than an opinion against the transaction, and that the persons engaged in it ought to be punished, is competent. *Lyons's case*, . . . 149

6. One who had formed, though not expressed, "some opinion" relative to the matter to be tried—who had made up his mind as to the subject of *treason*, provided the facts were proved, but not as to the guilt of the prisoner, was recommended by the Court to be withdrawn; the trial being one for treason; the definition of which word in application, though not abstractly, had not yet been perfectly settled by judicial decision; and the Court considering that his answer indicated that he might have 'made up his mind' on the law of treason; and made it up differently from what the Court would decide. *Smith's case*, . . . 150

7. The Court, in the early empanelling of jurors, where the numbers unchallenged are yet great—or in particular trials, or in particular circumstances,—as where public opinion has been abused by the party-press—or where there is reason to suppose that the opinion of the neighbourhood from which the jurors came, may be biassed—will allow more searching and particular questions to be put to the persons summoned as jurors, than it would afterwards, where it appears that a jury, such as would be entirely desirable, cannot be had; or where the case has not excited public interest. It will seek in the first instance, and as far as practicable, to have a jury not only free from legal bias, but even from any even light impressions about the case at all. *United States* v. *Hanway*, . . . 139

CLERK'S COMMISSIONS.

A clerk of the Circuit Courts of the United States is not, under the act of February 26th, 1853, relating to 'Clerks' Fees,' nor otherwise, entitled to commissions for "receiving, keeping, and paying out money," unless the fund has actually passed into the Court, or through the clerk's official hand, or has been agreed to be considered as having done so. The fact that the money is subject to the decree of the Court, it not being *in* the Court's registry, is not enough to give the clerk a right to commissions. *Ex parte Plitt*, ... 453

COLLISION.

1. Although the Court cannot establish a rule to bind vessels navigating the high seas to carry signal lights, yet where one vessel does so and another does not, the Court, in case of a collision, will go some way to treat the dark boat as the wrong doer. *Barque Delaware* v. *Steamer Osprey*, ... 268

2. The Court going in advance of hitherto adjudicated cases, would seem to enforce the obligation upon all boats navigating bays and rivers, not only to show lights on an approach, but to carry them constantly. *Id.*

3. Where a vessel is injured and sunk by collision in such a place, or under such circumstances, that for a small sum of money in comparison with the value of the vessel and cargo, she can be raised and repaired and the cargo recovered with slight damage, her owners have no right to abandon her and claim for a total loss. The doctrine of abandonment as connected with cases of insurance, has not been imported into Courts of Admiralty. *Clarke* v. *The Steamer Fashion*, . 339

4. A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other, for all injuries resulting from her proximity, which human skill or precaution could have guarded against. *Vantine* v. *The Lake*, . . 52

5. The schooner L., on entering a dock at high-tide, was directed by her consignees to be moored to an adjoining wharf of which they were lessees, outside of The M. J., a smaller vessel. There was not in the dock during part of the ebb, enough water for The L., though there was sufficient for The M. J.; of which fact the consignees, but not the master of The L., were aware. No objection was made at the time from The M. J., nor any caution given. On the tide receding, The L., on this account, and from the bottom of the dock being banked up in the middle from accidental causes, (with which the consignees were also acquainted,) careened over on The M. J., crushing her timbers, and causing her to fill and sink. As soon as the danger was perceived, a measure of prevention was suggested by The M. J., but rejected as useless. *Held*, that The L. was bound to know the depth of water in the dock, or at any rate was responsible for the directions of the consignees, who had full knowledge; and that she had not taken proper precaution before or after the injury. The L. condemned in damages. *Id.*

6. Besides the costs of repairs in this case, charges for wharfage while repairing; for the time of one of the owners, and of the crew in raising and clearing out the injured vessel; and for the loss of profits to the vessel while sunk, and during

COLLISION—*continued.*
the time she was being repaired, allowed by the Court in the assessment of damages. *Vantine* v. *The Lake*, ... 52

COMITY BETWEEN STATES.
1. The exercise of Admiralty jurisdiction in suits by foreign seamen for wages, is matter of comity rather than of duty; and generally speaking, is exercised only under such circumstances as might infer the presumption of a request from the foreign State: as, for example, where a voyage is ended or broken up, and the seamen discharged; or where there is strong reason to believe that there would be a failure of remedy, in case the mariners were compelled to await an opportunity of obtaining redress in their own courts. *Gonzales* v. *Minor*, . . 348
2. A general voluntary assignment, valid by the laws of one of the United States—though assumed to be void if it had been made in another—will carry property in that other against an attaching creditor there. *Caskie* v. *Webster*, . . 131
3. The case of *Ingraham* v. *Geyer*, decided A. D. 1816, in the Supreme Court of Massachusetts, in which an opposite doctrine was held, is not law. *Id.*

CONFLICT OF LAWS.
See JURISDICTION.

CONSCIENCE.
Perverted conscience is no excuse for violating the laws of the land. *Van Metre* v. *Mitchell*, ... 311

CONSUL.
A consul of a Foreign Power, though not entitled to represent his sovereign in a country where the sovereign has an ambassador, is entitled to intervene for all *subjects* of that Power interested: and though he should not set forth the particulars of his claim, still it will do if they can be fully gathered from the allegations of the libel and the case it sets forth. *Robson* v. *The Huntress*. . . . 59

COPYRIGHT.
A prose translation (having no qualities of a paraphrase) of a copyright prose romance, which the author had himself caused to be translated in a way he liked, and copyrighted, is not an infringement of the author's copyright of the original. *Stowe* v. *Thomas*, ... 547

COSTS.
1. A fund in the hands of an intestate's administrator, upon which a decree of this Court has acted, or is acting, is liable to three classes of charge: 1st. The necessary expenses of ascertaining it, and reducing it into possession. 2d. A reasonable compensation for its safe keeping, and the supervision of its interests. 3d. The expenses of ascertaining the proper distributees, and making distribution among them. Accordingly,
2. Under the 1st head the Court allowed a party who had claimed as next of kin (though unsuccessfully as to any part) a whole fund in an administrator's hands, the actual expenses of a foreign commission obtained by him under implied authority of the administrator, a stakeholder, to show that certain funds abroad were assets of the estate, and so increase it. And also allowed him a sum for his expenses and trouble successfully exercised in the same implied way in obtaining indemnity from the estate of a former administrator, who had committed a devastavit and died. But would allow no part of the expenses, nor any compensation for long, wearisome, and great trouble, to which he had been put in that part of his efforts which were made in his own behalf alone; and which, unlike the former ones, had not in their result enured as above mentioned to the benefit of the opposing claimants, who had been now recently and finally decreed entitled to the whole fund.
3. Under the 3d head the Court allowed another unsuccessful party claimant of the whole fund, the actual costs and expenses to which he had been put in showing the relationship of all parties to the intestate, thereby enabling the Court to give what it deemed a proper direction to the fund; although this party's object in showing this relationship had been to show a state of facts which, as *he* supposed, and in argument contended, gave *him* a right to the whole fund. But the Court allowed him nothing more; and, as on the former case, would allow no part of the expenses, nor any compensation for long, wearisome, and great trouble to which he had been put in that part of his efforts which were made in his own behalf alone; and which, unlike the former ones, had not in their result enured

COSTS—*continued.*

as above mentioned to the benefit of the opposing claimants, who had been now recently and finally decreed entitled to the whole fund.

4. Under this 3d head the Court allowed the counsellor of a special class of claimants who, by consent of another class, having, up to a certain point but no further, an interest common with this special class, and by order of Court, had rendered great professional service to the whole class *before* the point where the interests of the two classes diverged, a counsel fee of $6000 or 3-4 of 1 per cent. upon a fund distributable. The Court considering that there was no doubt of its power where a fund is within its control, to take care of the rights of the solicitors who have claims against it, whether for their costs technically speaking, or their reasonable counsel fees; and regarding such persons in no other light than as meritorious assignees of a part interest. *Ex parte Plitt*, ... 453

COSTS ON APPEAL.

1. On an appeal from the District Court in Admiralty where the decree of that Court is reversed here, the successful party has *costs on the Appeal*, unless new evidence was introduced above, which might have caused a different judgment, if it had been offered to the Court below. *The Margaret* v. *The Connestoga*, . . 116
2. Although, perhaps, in aggravated cases of appeal, where the judgment of the District Court in Admiralty is affirmed, the Court might add by way of taxable costs a sum for counsel fees, in this Court, yet such an allowance is not favoured. Involving the exercise of discretionary power, it is a dangerous jurisdiction and one disliked. And in the present case, although this Court had decided that the libellee was to blame, yet it refused an application to make him pay fees to the libellant's counsel. *Id.*
3. In a case of 'transparent contrivance,' proved by an intervenor upon evidence in this Court, which was not before the Court below, the libel was dismissed with costs to the intervenors and consignees, against the libellants and the contriving defendant, contrary to the rule established in *Carrigan* v. *The Charles Pitman*, (1 *Wallace, Jr.*, 307,) which does not allow costs on a judgment of reversal in this Court, obtained upon new evidence, not had in the Court below. *Gonzales* v. *Minor*, ... 348

COUNSEL AND COUNSEL FEES.

1. Admitting, for the sake of argument, that the allegation of a mistake of the law would give jurisdiction to a court of equity in a common case, and be a ground for relief; yet the Court will not listen to the allegation that a member of the bar has made such a mistake. It can hardly be successfully averred even by the party whose counsel, he would confess, has made it. *Magniac* v. *Thomson*, . 209
2. On a habeas corpus, in a question of conflict between State and Federal process, counsel have no right to appear in defence of the State process, unless in some way authorized by the State or its proper officers; and, after return made, the Court refused to hear as counsel a member of the bar, who showed no such authority; nor any authority beyond that of the person executing the State writ. *Ex parte Jenkins*, ... 521
3. In a prosecution in the Circuit for treason, in the alleged commission of which a citizen of a State, without the Circuit, had been assaulted and killed, the Court approves of the presence of special counsel from that State; as well counsel coming here by order of the governor of the State, as counsel employed by the friends of the deceased. *United States* v. *Hanway*, ... 139
4. Although, perhaps, in aggravated cases of appeal, where the judgment of the District Court in Admiralty is affirmed, the Court might add by way of taxable costs a sum for counsel fees, in this Court, yet such an allowance is not favoured. Involving the exercise of discretionary power, it is a dangerous jurisdiction and one disliked. And in the present case, although this Court had decided that the libellee was to blame, yet it refused an application to make him pay fees to the libellant's counsel. *The Margaret* v. *The Connestoga*, ... 116
5. There is no doubt of the power of the Court where a fund is within its control, to take care of the rights of the solicitors who have claims against it, whether for their costs technically speaking, or their reasonable counsel fees. Such persons are regarded as meritorious assignees of a part interest. *Ex parte Plitt*, . 453
6. The Court makes some extra judicial remarks, in reply to argument at the bar, upon what are called contingent fees, or fees stipulated beforehand to be paid on the successful result of the litigation. It speaks of the practice of making such stipulations as not to be generally commended, exposing honourable men to mis-

COUNSEL AND COUNSEL FEES—*continued.*

apprehension and illiberal remark, and giving the apparent sanction of their example to conduct which they would be among the foremost to reprehend. And though the Court remarked that such contracts might sometimes be necessary, in a community such as that of Pennsylvania had been, and perhaps as it is yet; and that where they have been made in abundant good faith, *uberrimâ fide*, without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client;" the Court would hold them valid; yet they remarked further that it was almost unnecessary to say, that such contracts, as they could scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny before they can expect the judicial ratification. *Ex parte Plitt*, ... 453

7. A case before the Court being an exceptional and very peculiar case, where there was a large fund left by a bachelor, with doubtful domicil and of uncertain sanity, without any near relatives, but vast numbers of remote ones, to his "heir-at-law or lawful heir," where the claimants were very numerous, poor, scattered about the world, having fractional interests, and quite unable to pay counsel for maintaining what after a quarter of a century's hard litigation, and without any compromise, was decided to be their just rights; and where the Court knew the whole extent of the counsel's labours, and knew also the rate of commission, and the whole extent of the gross sum received by them; such a case was regarded by the Court as illustrating very fairly the *occasional* policy of such contracts. And in the case of a fund of $800,000 or thereabouts, the Court did not consider as unconscionable a stipulation for a contingent compensation of 7½ per cent.; it being by the terms of the contract divisible between three counsel, the suit having been pending for 25 years; having required an enormous mass of testimony from England as well as here; having been argued three or four times in this Court, and as many times before the Supreme Court at Washington; and having been finally adjudged there only by an equally divided Court. *Id.*

DEDICATION OF INVENTIONS.

1. A description by an applicant for a patent, of a machine in which he sets forth his invention to be *for a combination of machinery*, not giving notice that he claims any *part* as new, is a dedication of that *part* to the public. *Batten* v. *Taggert*, ... 101

2. After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of 1836, nor the seventh section of the act of 1837, relating to amending of patents, authorizing a new patent for an invention different from that originally patented. *Id.*

DEVISE.

1. A devise to one's 'heir-at-law,' or 'lawful heir,' passes the estate to such persons as, at the time of the testator's death, answer by the then existing law that description; and contemplates not only changes from death in the persons designated by the term, but changes also by legislation in the *laws* regulating successions and descent. Thus where a testator domiciled technically in Pennsylvania, though resident most of his life in England, devised estates to his 'heir-at-law,' or 'lawful heir,' those terms, as the law stood when he made his will, indicating the heir at the common law of England, but, at the time of the testator's death, indicating wholly different persons—st. whole classes, who were absolutely incapable of inheriting, as the law stood when the will was made—it was held that these last persons, and not the former person, were the 'heir-at-law,' or 'lawful heir,' and the parties, therefore, to take. *Aspden's Estate*, ... 368

2. The terms 'heir-at-law,' or 'lawful heir,' mean so clearly and fixedly, in Pennsylvania, heir by the law of *that State*, whatever it may be, statutory or other, that its meaning is not easily controlled or shaped into the common law signification, when differing from it. Thus where a testator, domiciled technically in Pennsylvania, though resident most of his life in England, devised his estates to his 'heir-at-law,' or 'lawful heir,' he *first* paying certain legacies to A. B. & C.; it was held, that A. B. & C., being the Pennsylvania statutory heirs, should take the estates, notwithstanding the provision by which they would have *first* to pay *themselves* the legacies; and that the estates should not go to D., a different person, the heir at common law, who could more properly *first* pay the legacies to

DEVISE—*continued.*

A. B. & C. while subject to, or after such payment, he took the estates himself. *Aspden's Estate,* 368

3. A general testamentary disposition of all one's 'estate *real* and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who had no real estate, either when his will was made, or afterwards, is not a disposition of it to *the next of kin;* the term 'heir' being capable of an abstract sense as well as of a concrete one; and it not being true in legal any more than in popular sense, that there can be no *heir,* unless there is property strictly *heritable. Id.*

4. A general testamentary disposition of all one's 'estate *real* and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who, neither in law nor in fact, had any real estate, either when his will was made or afterwards, but who, some years prior to the time his will was made, received by devise from his father such estate, which he himself occupied for some time, and never *aliened,* but which had been confiscated by the commonwealth for his alleged treason, and had been, in law and in fact, irrecoverably taken from him by legislative acts, whose legality, *validity,* and moral justice he ever strenuously denied, and which estate he always pertinaciously, though absurdly, claimed during a term of more than forty years, and until the day of his death, to own and dispose of as his own, entertaining a hope or pretence of hope, though an absurd hope, that his heir if not himself, would some day gain it; it being a thing, as the testator warmly, though absurdly said, in which his heir had rights, and which "*he could not lose:*"—does not carry the personal estate into the channel of heirship *ex parte paternâ,* as distinguished from heirs *general. Id.*

DEVISE OF AFTER-ACQUIRED LANDS.

1. It being admitted that a devise of real estate to which, *at the date of the devise,* the testator had not a good title; but of which nevertheless he had an actual, notorious and continuing possession, and one that by time might have ripened into title, and under which possession and pretence of title he claimed entire ownership, does not carry the estate as real estate owned at the date of the will; the Court here further decides that *a good title* acquired *subsequently* to the date of the devise, will not be attracted nor cohere to the old claim or imperfect interest, so as to be merged, or extinguished in it, and so to pass the estate as real estate acquired *previously* to the date of the will, and that payment of taxes for even more than 21 years, without an adverse possession during that length of time, gives no colour of title; though it defines extent of claim. And so an entry to run lines, &c. *Girard's Heirs* v. *The City of Philadelphia,* 301

EQUITY.

1. Where a bill sets forth such leading facts as do not, when analysed, show a case of fraud or mistake—allegations or averments in the bill that there was fraud or mistake, and the expressions 'fraudulently,' 'deceitfully,' 'by mistake,' &c., interspersed throughout it, will not bring the case within equitable jurisdiction, *even on a demurrer to the bill. Magniac* v. *Thomson,* 209

2. Admitting, for the sake of argument, that the allegation of a mistake of the law would give jurisdiction to a court of equity in a common case, and be a ground for relief; yet the Court will not listen to the allegation that a member of the bar has made such a mistake. It can hardly be successfully averred even by the party whose counsel, he would confess, has made it. *Id.*

3. Where one, having arrested his debtor defendant on a *ca. sa.,* sets him at liberty on certain terms, at *his* instance, it being "expressly acknowledged" by the defendant that this is done "for *his* accommodation, *without any prejudice whatever* to arise to the plaintiff's right by the enlargement" as aforesaid, "or *otherwise howsoever;*" the debt is paid at law. No further execution of any sort can be issued there. And the agreement having been drawn and signed by the plaintiff's own attorney, a learned and able counsellor at law, a Court of Equity will not interpose to enjoin the defendant from pleading this discharge as payment, by allegations in a bill *demurred to,* that there was either a mistake common to both parties as to the effect of the agreement; or else that the plaintiff not knowing its effect, while the defendant did know it, it would be a fraud in the defendant now to profit of the plaintiff's misconception or ignorance of what he was doing; and set up at law the payment by his liberation on the *ca. sa. Id.*

4. Where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a patent, and of the fact of infringement, it will not send the case to a jury to have its verdict prior to granting a

EQUITY—*continued.*

perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that a court can decide them on the testimony of men of science, as well as, or better than a jury; and where a jury trial would be long, costly or troublesome. *Goodyear* v. *Day*, . . . 283

5. It is not necessary for the protection of a patent, that the patentee should be the first person, who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or valuable result. He who reduces speculation to practice; whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine or product, is entitled to the patent right. *Id.*

6. After a question of title to lands in Pennsylvania, has been, *in substance*, three times before courts of competent jurisdiction, all of which have been of opinion against it—an opinion which this Court, also, on understanding it, concurs in—this Court will enjoin further proceedings at law, and compel the party claiming under such title to give up the evidences of it, and to make a deed of all his estate derived under them to the party whom he has been vexing. And this though the title alleged in the first suit was not formally the same as that in the second, and though in the third, the plaintiff by suffering a nonsuit prevented a verdict and judgment against him at all. The Pennsylvania Statute of April 13th, 1807, enacting that "two verdicts" and judgments thereon, in succession for the same party, in ejectment between the same parties, shall 'bar the right,' was intended to supply a want of equitable power in the Pennsylvania courts, as then constituted; and whatever it may mean, does not prevent this Court, which has complete equity powers, from giving complete equity relief in such a case as is above stated. *Craft* v. *Lathrop*, ... 103

7. Even where no judgment of foreclosure has been entered on a mortgage, yet if the mortgagor allows the mortgagee to hold possession for twenty years without accounting, or without admitting that he possesses the mortgage title only, the mortgagee's title becomes as absolute in equity, as it was previously at law; and this though the land has grown greatly valuable during the term. *Cromwell* v. *The Bank of Pittsburg*, ... 569

8. Even where no judgment of foreclosure has been entered on a mortgage, yet if the mortgagor has admitted in writing the whole mortgage debt to be due; has assisted by his signature and acts to forward and expedite the master or sheriff's sale of the mortgaged premises; waiving matters of form; surrendering possession to the purchaser; and moving away, or standing by and suffering purchasers, for large and valuable consideration, to improve the property,—he is equitably estopped *in pais* from asserting his ownership for want of a proper authority, at the time, in the master or sheriff to sell. *Id.*

EQUITY BETWEEN PARTNERS OR STOCKHOLDERS.

Where stockholders in a bank, whose charter gives them a *right*, but does not *oblige* them to pay in full, the prices of stock subscribed, pay, some of them in full, and some but in part, and the bank goes into liquidation from a loss sufficiently partial to allow such a rule: the stockholders who have paid in full have a right to a return of the excess paid by them above the others, who have paid but in part, before any division of its balance takes place. This balance is then to be divided (after deducting the loss) rateably among the stockholders. And this, though the bank has been in operation for many years, making dividends of profits in proportion to the amounts paid in.

Exemp. Gr. A. B. and C. each subscribe, in 1814, to the stock of a bank, whose shares are $50, to be paid as the Bank Board shall direct. In 1817, the Board *directs*, that all the stockholders pay $30 a share; and *allows* them to pay part, or all the balance. B. pays $10 of the balance, and A. $20—the whole balance; so that A. has paid in all $50, B. $40, and C. $30. The bank makes semi-annual dividends on profits till 1845, when, having $200,000 of its allowed capital paid in, it meets with a loss of $50,000, and goes into liquidation. A. is entitled to receive $10 on his share, before B. receives any thing. And A. is entitled to $10 more on his share, and B. $10 on his share, before C. receives any thing: and then, the loss being deducted, they are to receive rateably. *Krebbs* v. *The Carlisle Bank*, ... 33

ESTOPPEL IN PAIS.

See EQUITY, 7, 8.

EVIDENCE.

1. On an indictment for treason, everything tending to show that there was an intention to make public resistance to a law of the United States, is entirely evidence in chief, and cannot be received in rebuttal. *United States* v. *Hanway*, . . 139
2. On an indictment for treason, the intent of the act, being essential, it is competent to show, that a long time (say within nine months) before the alleged treasonable occurrence, facts had occurred, and rumours were prevalent in the neighbourhood, which would explain certain particulars relied on, to show treasonable intent, and make them show a different intent. *Id.*
3. A person who stands indicted of treason along with the defendant in *another* indictment not now trying, is a competent witness for him in an indictment now trying, and in which such person is not included. *Id.*
4. On an indictment under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American Registry is not even *primâ facie* evidence of such ownership; though such registry is made by the government only on the pre-supposition of such ownership, and after oath by one or more persons of such ownership by them. Nor is general reputation of such ownership any evidence of it. Ownership in such a case is a fact to be proved as other facts. *United States* v. *Brune*, . . . 264
5. Parol evidence cannot be received to show in what sense a testator used certain words, they being well settled terms of law: e. g., to show that a testator, who lived most of his life in England, though technically domiciled in Pennsylvania, used the term 'heir at law' not in the Pennsylvania statute sense, this being its true and settled legal sense, but in the popular sense of heir by the English Common Law. *Aspden's Estate*, ... 369
6. A lien for work done to vessels is not necessarily discharged by the party's taking a note, and giving a *receipt in full*. Such receipt may be explained by showing negatively, that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, a different purpose which induced the transaction. *Sutton* v. *The Albatross*, ... 327

FEDERAL AND STATE JURISDICTION.

See JURISDICTION.

FUGITIVE SLAVE LAW.

A law of Congress enacts, that if any person shall *harbour or conceal* a fugitive from labour after *notice* that he or she is so, such person *shall forfeit and pay* $500 to be recovered by action of debt; *saving moreover* to the owner of such fugitive *a right of action on account of the injuries*, &c.

1. Notice here means knowledge: and harbouring means entertaining or sheltering a fugitive with the purpose of encouraging him in his desertion of his master; with the purpose to further his escape, and to impede and frustrate the master's reclamation of him. 'Harbouring' is not here synonymous with 'concealing' used in the same phrase with it: and there may be harbouring without any concealment. *Van Metre* v. *Mitchell*, ... 311
2. Under this act, if the plaintiff sues in debt for the penalty of $500, which it gives for illegally harbouring and concealing, he may recover it upon proof of such harbouring or concealment, irrespectively of any proof of actual damage to himself. But if he brings case 'on account of the injuries,' for which the act saves a right of action, he can recover only to the amount of actual damage, which he shows he has suffered. *Oliver* v. *Weakley*, ... 324

GRANT AS DISTINGUISHED FROM LICENSE.

1. Where one owning a large tract of land, grants, bargains and sells part of it, and for himself, his *heirs, executors, and administrators*, covenants, promises, grants, and agrees, with the grantee, his *heirs and assigns*, that he and they may dig, take and carry away *all iron ore to be found* within the ungranted part of the tract, paying so much a ton, this is not a grant of the ore, but of a right or privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised. *Grubb* v. *Bayard*, ... 81
2. The right is without stint, but is not exclusive of the owner of the soil. *Id.*
3. It is indivisible, and an assignee of it, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil. *Id.*

HABEAS CORPUS.

1. On a habeas corpus, in a question of conflict between State and Federal process,

HABEAS CORPUS—*continued.*

counsel have no right to appear in defence of the State process, unless in some way authorized by the State or its proper officers; and after return made, the Court refused to hear as counsel a member of the bar, who showed no such authority; nor any authority beyond that of the person executing the State writ. *Ex parte Jenkins,* 521

2. The Court may issue a habeas corpus to bring before it one of its deputy Marshals, arrested and put in gaol under State process—whether of a justice of the peace or of the Court, or Supreme Court,—whether criminal or civil—for his conduct in executing a writ issued under the Fugitive Slave Law; may inquire into the cause of commitment, and, if illegal, order a complete discharge. And in the case of an arrest, on State process, of an officer of the United States, for an alleged abuse of his powers, this Court will not only hear evidence to disprove the truth of the affidavits upon which the State authorities proceeded, but will, independently of such proof, consider those affidavits; and if, in the judgment of this Court, those affidavits do not contain a *primâ facie* ground for arrest, will discharge the federal officer, without hearing any counter-evidence. As a general thing, moreover, in the case of such an officer the Court will discharge him unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others, to supply its place. *Id.*

3. If an officer of the United States has been arrested to answer an indictment found by a State Court, for riot, assault and battery, and assault with attempt to kill, the indictment not showing that the alleged offences were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or Court thereof, this Court, on a habeas corpus, where the petition of the officer denies the offence, and avers that what is alleged as offence was done in proper execution of an order, process, or decree of a federal Court, will go outside the indictment, and hear evidence to show the truth of the facts set forth by the officer. *Id.*

HEIR AT LAW OR LAWFUL HEIR.

1. The term 'heir-at-law,' especially when found in context with the term 'lawful heir' as a synonyme, means, in Pennsylvania, the person on whom the law of the commonwealth casts the real estate of an intestate, at the time of his death; and it does not mean the person on whom the common law of England, as distinguished frem the law of Pennsylvania, casts such estate. *Aepden's Estate,* . 368

2. A devise to one's 'heir-at-law,' or 'lawful heir,' passes the estate to such persons as, at the time of the testator's death, answer by the then existing law that description; and contemplates not only changes from death in the persons designated by the term, but changes also by legislation in the *laws* regulating successions and descent. Thus where a testator domiciled technically in Pennsylvania, though resident most of his life in England, devised estates to his 'heir-at-law,' or 'lawful heir,' those terms, as the law stood when he made his will, indicating the heir at the common law of England, but, at the time of the testator's death, indicating wholly different persons—st. whole classes, who were absolutely incapable of inheriting, as the law stood when the will was made—it was held that these last persons, and not the former person, were the 'heir-at-law,' or 'lawful heir,' and the parties, therefore, to take. *Id.*

The terms 'heir-at-law,' or 'lawful heir,' mean so clearly and fixedly, in Pennsylvania, heir by the law of *that State,* whatever it may be, statutory or other, that its meaning is not easily controlled or shaped into the common law signification, when differing from it. Thus where a testator, domiciled technically in Pennsylvania, though resident most of his life in England, devised his estates to his 'heir-at-law,' or 'lawful heir,' he *first* paying certain legacies to A. B. & C.; it was held, that A. B. & C., being the Pennsylvania statutory heirs, should take the estates, notwithstanding the provision by which they would have *first* to pay *themselves* the legacies; and that the estates should not go to D., a different person, the heir at common law, who could more properly *first* pay the legacies to A. B. & C. while subject to, or after such payment, he took the estates himself. *Id.*

4. Though the expression 'heir-at-law,' has been often used in professional and judicial parlance in Pennsylvania, as meaning heir at the common law of England, yet it is not rightly and with legal exactness so used. And especially when explained by the term 'lawful heir,' used as a synonyme with it, it presents no such ambiguity as to let in parol evidence, of any kind, as to the sense in which a testator technically domiciled in Pennsylvania, though resident most of his life in

HEIR AT LAW OR LAWFUL HEIR—*continued.*

England, used it; or more particularly to show that such a testator used it in the sense of the English common law, *i. e.* to mean the person who should, at the time of his death, be nearest in blood and descent from a common ancestor of the full blood, by his father's side, and did not use it in its general legal sense, *i. e.* to mean the person or persons on whom the law of his domicil would cast his real estate, on his death intestate. *Aspden's Estate*, ... 368

5. A general testamentary disposition of all one's 'estate *real* and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who had no real estate, either when his will was made, or afterwards, is not a disposition of it to *the next of kin;* the term 'heir' being capable of an abstract sense as well as of a concrete one; and it not being true in legal any more than in popular sense, that there can be no *heir*, unless there is property strictly *heritable*. *Id.*

6. A general testamentary disposition of all one's 'estate *real* and personal,' to his 'heir-at-law,' or 'lawful heir,' by one who, neither in law nor in fact, had any real estate, either when his will was made or afterwards, but who, some years prior to the time his will was made, received by devise from his father such estate, which he himself occupied for some time, and never *aliened*, but which had been confiscated by the commonwealth for his alleged treason, and had been, in law and in fact, irrecoverably taken from him by legislative acts, whose legality, *validity*, and moral justice he ever strenuously denied, and which estate he always pertinaciously, though absurdly, claimed during a term of more than forty years, and until the day of his death, to own and dispose of as his own, entertaining a hope or pretence of hope, though an absurd hope, that his heir if not himself, would some day gain it; it being a thing, as the testator warmly, though absurdly said, in which his heir had rights, and which "*he could not lose:*"—does not carry the personal estate into the channel of heirship *ex parte paternâ*, as distinguished from heirs *general*. *Id.*

7. Nor can evidence extrinsic to his will, of the testator's mistaken and absurd belief, be received to narrow the construction of terms of law so clear, unrestricted, and general as 'heir-at-law,' or 'lawful heir,' which terms, including heirs *ex parte maternâ*, as much as heirs *ex parte paternâ*, passes the personal estate to the heirs of both sides jointly. *Id.*

INJUNCTION.

Where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a patent, and of the fact of infringement, it will not send the case to a jury to have its verdict prior to granting a perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that a court can decide them on the testimony of men of science, as well as, or better than a jury; and where a jury trial would be long, costly or troublesome. *Goodyear* v. *Day*, . . . 283

INSURANCE.

1. Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all. *Jones* v. *The Insurance Co.*, . . . 278

2. The Court, supposing a case not before it, says: It *may* indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; *or*, that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence. *Id.*

JUDGMENT.

1. The history of records and of the mode of entering judgments in Pennsylvania, given in detail; and the loose and careless mode of preserving judicial papers, and transacting matters of form, by judges, prothonotaries, attorneys and parties in Pennsylvania, set forth. It is declared that a record is seldom or never, and never need be, made up at the time in form; all that is required being sufficient outline entries upon which, as upon a fabric or frame, a formal record can be afterwards wove or filled in, so as to be certified if wanted. *Cromwell* v. *The Bank of Pittsburg*, ... 569

JUDGMENT—*continued.*

2. No actual, formal entry of judgment, on any docket or other paper, need be made by either Court or prothonotary to justify the issue of final process, as on a judgment. If the party himself, prior to the precipe for final process, have signed a paper meant to authorize such entry—whether such paper be expressed in the present or in the past tense—it is enough. The clerk may enter judgment on his dockets, or make up a formal record at any time afterwards. e. g. If a party by writing, signed, says, "In my proper person, I this day appeared and confessed judgment to the plaintiff, for, &c., besides costs," &c., on this final process may issue, even though no more formal entry of judgment have been made on the docket, or on the record by the Court or prothonotary, or by any body. *Cromwell* v. *The Bank of Pittsburg*, . . 569
3. The original or rough docket upon which, according to ordinary practice of the Court, judgments were formally entered, having been lost, such formal entry of a judgment, may, at the distance of thirty years, be presumed, from the fact that the defendant in the case had signed a writing, filed among the papers of the case, prior to the alleged date of judgment, saying that he had appeared and confessed judgment; this writing being followed immediately by a precipe for final process, and by final process itself, both of which recite a judgment; by an agreement of the defendant expediting the sale, indorsed on such final process; by an actual sale made with his concurrence, and remaining unquestioned by him during the residue of his life, a term of about thirty years. And this although the final process recite a judgment, as of a date different from the day when judgment was alleged to have been entered; to wit, recite a judgment as entered on the 13th of May, 1820, instead of the 13th of September, 1820; and although no entry of judgment was made upon a larger and cleaner docket, upon which it was as usual to transcribe the entry of judgments from an original or rough docket, as to enter them previously upon the latter docket itself. *Id.*
4. If the record shows anything to amend by, the Court may amend its own records at the distance of fifteen years, as in this case, or at any distance of time, without any notice to the parties, and without their presence. The action of the Court in this respect, cannot be questioned by another Court, even upon error. *Id.*

JURISDICTION.

1. In suing on a chose in action, if the plaintiff be not a citizen of the same State as the defendant, his right to sue is not taken away by the fact that the chose may have passed to him through the hands of persons who were citizens of that State, and so unable to prosecute a suit in this Court, provided the party to whom the chose was originally given was not such a citizen, and could himself have therefore prosecuted such a suit. *Milledollar* v. *Bell*, ... 334
2. The Court may issue a habeas corpus to bring before it one of its deputy Marshals, arrested and put in gaol under State process—whether of a justice of the peace or of the Court, or Supreme Court,—whether criminal or civil—for his conduct in executing a writ issued under the Fugitive Slave Law; may inquire into the cause of commitment, and, if illegal, order a complete discharge. And in the case of an arrest, on State process, of an officer of the United States, for an alleged abuse of his powers, this Court will not only hear evidence to disprove the truth of the affidavits upon which the State authorities proceeded, but will, independently of such proof, consider those affidavits; and if, in the judgment of this Court, those affidavits do not contain a *prima facie* ground for arrest, will discharge the federal officer, without hearing any counter-evidence. As a general thing, moreover, in the case of such an officer the Court will discharge him, unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others, to supply its place. *Exparte Jenkins*, ... 521
3. If an officer of the United States has been arrested to answer an indictment found by a State Court, for riot, assault and battery, and assault with attempt to kill, the indictment not showing that the alleged offences were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or Court thereof, this Court, on a habeas corpus, where the petition of the officer denies the offence, and avers that what is alleged as offence was done in proper execution of an order, process, or decree of a federal Court, will go outside the indictment, and hear evidence to show the truth of the facts set forth by the officer. *Id.*

LICENSE AS DISTINGUISHED FROM GRANT.
See GRANT AS DISTINGUISHED FROM LICENSE.

LIEN IN ADMIRALTY.
The lien for wages of a seaman, who is himself a part-owner of a vessel on which he serves, is discharged by a sheriff's sale of her, on execution against her owners. And this, although as a general principle, a sheriff's sale of a vessel does not discharge the sailor's lien upon her. *Gallatin & Wood* v. *The Pilot*, . . 592

MASTER AND SERVANT.
Where a large vessel—a ship—is in tow of a small one—a steam tug—the latter is in law regarded as the servant of the former; and being thus its agent, and so bound to obey its orders, is not responsible for damage in the proper course of the employment. *Smith* v. *The Creole and The Sampson*, ... 485

NATIONAL LAW.
1. The exercise of Admiralty jurisdiction in suits by foreign seamen for wages, is matter of comity rather than of duty; and generally speaking, is exercised only under such circumstances as might infer the presumption of a request from the foreign State; as, for example, where a voyage is ended or broken up, and the seamen discharged; or where there is strong reason to believe that there would be a failure of remedy, in case the mariners were compelled to await an opportunity of obtaining redress in their own courts. *Gonsales* v. *Minor*, . . 348
2. A consul of a foreign power, though not entitled to represent his sovereign in a country where the sovereign has an ambassador, is entitled to intervene for all *subjects* of that power interested; and though he should not set forth the particulars of his claim, still it will do if they can be fully gathered from the allegations of the libel and the case it set forth. *Robson* v. *The Huntress*, . . 59

NOTICE.
Notice is in some cases synonymous with knowledge, and it is used in this sense in the Fugitive Slave Law of Congress, which enacts, that if any person shall harbour or conceal a fugitive after *notice* that he is so, such person shall forfeit, &c. Notice here means knowledge. *Van Metre* v. *Mitchell*, ... 311

PARTNERS OR STOCKHOLDERS, EQUITY BETWEEN THEM.
1. Where stockholders in a bank, whose charter gives them a *right* but does not *oblige* them to pay in full, the price of stock subscribed, pay, some of them in full, and some but in part, and the bank goes into liquidation from a loss sufficiently partial to allow such a rule: the stockholders who have paid in full have a right to a return of the excess paid by them above the others, who have paid but in part, before any division of its balance takes place. This balance is then to be divided (after deducting the loss) rateably among the stockholders. And this, though the bank has been in operation for many years, making dividends of profits in proportion to the amounts paid in. *Krebbs* v. *The Carlisle Bank*, . . 33
2. *Exemp. Gr.* A. B. and C. each subscribe, in 1814, to the stock of a bank, whose shares are $50, to be paid as the Bank Board shall direct. In 1817 the Board *directs*, that all the stockholders pay $30 a share; and *allows* them to pay part, or all the balance. B. pays $10 of the balance, and A. $20—the whole balance; so that A. has paid in all $50, B. $40, and C. $30. The bank makes semi-annual dividends on profits till 1845, when, having $200,000 of its allowed capital paid in, it meets with a loss of $50,000, and goes into liquidation. A. is entitled to receive $10 on his share, before B. receives anything. And A. is entitled to $10 more on his share, and B. $10 on his share, before C. receives any thing: and then, the loss being deducted, they are to receive rateably. *Id.*

PATENT.
1. It is not necessary for the protection of a patent, that the patentee should be the first person, who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or valuable result. He who reduces speculation to practice; whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine or product, is entitled to the patent right. *Goodyear* v. *Day*, ... 283
2. Patents are benignly construed in favour of inventors; and in considering the validity of a patent, objected to for want of a proper "description of the invention

PATENT—*continued.*

or discovery" having been filed previously to its issue, this description, even if quite wide of truth when taken literally, may be aided and made good by the description of "the manner and process of making, constructing, using and compounding the same." Thus, where the "description of the invention or discovery" described a *process*, and did not describe a *product*, but the description of "the manner and process" showed that the purpose and merit of the process was the production of a valuable '*fabric*,' it was held, in a suit for infringing the patent, by improperly using the product, to be no objection that the "description of the discovery or invention" described not it, but a *process*; the "description of the manner and process" showing that the purpose and merit of the process was the production of a '*fabric*.' *Goodyear* v. *The Rail Road*, ... 356

3. When a full and candid description of the manner and process of making and compounding any invention or discovery, describes such manner in a concrete and illustrative, rather than in an abstracted and essential way, the description will cover every kind of application which was meant to come within, and which men of science can see is really involved in the principle attempted to be described. And so conversely, where an abstract description or abstract term is used, or an agent is described generally, rather than in its forms, the application of the thing, and not the form of the thing being patented,—this is enough. The last point is the one adjudged, the other being asserted. *Id.*
4. A description, by an applicant for a patent, of a machine in which he sets forth his invention to be *for a combination of machinery*, not giving notice that he claims any *part* as new, is a dedication of that *part* to the public. *Batten* v. *Taggert*, ... 101
5. After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of 1836, nor the 7th section of the act of 1837, relating to amending of patents, authorizing a new patent for an invention different from that originally patented. *Id.*

PRACTICE.

1. Although there is an act of Congress, which allows subpœnas *ad testificandum* to run from the Circuit Courts into districts not their own, yet where the witness who has been thus subpœnaed, shows no disposition to treat the process of the Court with contempt, the issuing of an attachment is always matter of discretion with the Court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the Court will not compel his attendance; but will either postpone the cause or have his deposition taken. *Ex parte Beebees*, 127
2. In suing on a chose in action, if the plaintiff be not a citizen of the same State as the defendant, his right to sue is not taken away by the fact that the chose may have passed to him through the hands of persons who were citizens of that State, and so unable to prosecute a suit in this Court, provided the party to whom the chose was originally given was not such a citizen, and could himself have therefore prosecuted such a suit. *Milledollar* v. *Bell*, ... 334
3. In a case of 'transparent contrivance,' proved by an intervenor upon evidence in this Court, which was not before the Court below, the libel was dismissed with costs to the intervenors and consignees, against the libellants and the contriving defendant, contrary to the rule established in *Carrigan* v. *The Charles Pitman*, (1 *Wallace, Jr.* 307,) which does not allow costs on a judgment of reversal in this Court, obtained upon new evidence, not had in the Court below. *Gonzales* v. *Minor*, ... 348

See CHALLENGE OF JURORS.

RECORD.

1. The history of records and of the mode of entering judgments in Pennsylvania, given in detail; and the loose and careless mode of preserving judicial papers, and transacting matters of form, by judges, prothonotaries, attorneys and parties in Pennsylvania, set forth. It is declared that a record is seldom or never, and never need be, made up at the time in form; all that is required being sufficient outline entries upon which, as upon a fabric or frame, a formal record can be afterwards wove or filled in, so as to be certified if wanted. *Cromwell* v. *The Bank of Pittsburg*, ... 569
2. No actual, formal entry of judgment, on any docket or other paper, need be made by either Court or prothonotary to justify the issue of final process, as on a

RECORD—*continued.*

judgment. If the party himself, prior to the precipe for final process, have signed a paper meant to authorize such entry—whether such paper be expressed in the present or in the past tense—it is enough. The clerk may enter judgment on his dockets, or make up a formal record at any time afterwards. e. g. If a party by writing, signed, says, "In my proper person, I this day appeared and confessed judgment to the plaintiff, for, &c., besides costs," &c., on this final process may issue, even though no more formal entry of judgment have been made on the docket, or on the record by the Court or prothonotary, or by any body. *Cromwell* v. *The Bank of Pittsburg*, ... 569

3. The original or rough docket upon which, according to ordinary practice of the Court, judgments were formally entered, having been lost, such formal entry of a judgment, may, at the distance of thirty years, be presumed, from the fact that the defendant in the case had signed a writing, filed among the papers of the case, prior to the alleged date of judgment, saying that he had appeared and confessed judgment; this writing being followed immediately by a precipe for final process, and by final process itself, both of which recite a judgment; by an agreement of the defendant expediting the sale, indorsed on such final process; by an actual sale made with his concurrence, and remaining unquestioned by him during the residue of his life, a term of about thirty years. And this although the final process recite a judgment, as of a date different from the day when judgment was alleged to have been entered; to wit, recite a judgment as entered on the 13th of May, 1820, instead of the 13th of September, 1820; and although no entry of judgment was made upon a larger and cleaner docket, upon which it was as usual to transcribe the entry of judgments from an original or rough docket, as to enter them previously upon the latter docket itself. *Id.*

4. If the record shows anything to amend by, the Court may amend its own records at the distance of fifteen years, as in this case, or at any distance of time, without any notice to the parties, and without their presence. The action of the Court in this respect, cannot be questioned by another Court, even upon error. *Id.*

REGISTRY OF SHIP.

On an indictment under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American Registry is not even *prima facie* evidence of such ownership; though such registry is made by the government only on the pre-supposition of such ownership, and after oath by one or more persons of such ownership by them. Nor is general reputation of such ownership any evidence of it. Ownership in such a case is a fact to be proved as other facts. *United States* v. *Brune*, . . . 264

RELEASE OF LIEN.

Under the Pennsylvania Statute of June 13, 1836, giving to mechanics a lien for work done to vessels, the lien is not necessarily discharged by the party's taking a note, and giving a *receipt in full*. Such receipt may be explained by showing negatively, that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, a different purpose which induced the transaction. *Sutton* v. *The Albatross*, ... 327

SALVAGE.

The officers and crew of a Foreign Vessel of War are entitled to salvage in causes, civil and maritime, as other vessels are. Application of the principle of salvage to particular facts, and amount of salvage fixed in them. *Robson* v. *The Huntress*, 59

SEA WORTHINESS.

1. Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all. *Jones* v. *The Insurance Company*, . 278

2. The Court, supposing a case not before it says: It *may* indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; *or*, that having come into a distant port in a damaged condition before or after the commence-

SEA WORTHINESS—*continued.*
ment of the risk, where she might or ought to have been repaired, the owner or his agents neglected to repair her, and that she was lost in consequence. *Jones* v. *The Insurance Company*, ... 278

SHERIFF'S SALE.
The lien for wages of a seaman, who is himself a part-owner of the vessel on which he serves, is discharged by a sheriff's sale of her, on execution against her owners. And this, although as a general principle, a sheriff's sale of a vessel does not discharge the sailor's lien upon her. *Gallatin & Wood* v. *The Pilot*, ... 592

SIGNAL LIGHTS.
Although the Court cannot establish a rule to bind vessels navigating the high seas to carry signal lights, yet where one vessel does so and another does not, the Court, in case of a collision, will go some way to treat the dark boat as the wrong doer. And the Court going in advance of hitherto adjudicated cases, would seem to enforce the obligation upon all boats navigating bays and rivers, not only to show lights on an approach, but to carry them constantly. *Barque Delaware* v. *The Steamer Osprey*, ... 268

STATE AND FEDERAL JURISDICTION.
See JURISDICTION.

STATUTES.
1. An act of a State legislature laying a tax on *all* real estate, *to wit*, on *various sorts of real estate specified by the act, and as such shown to be private property*, does not include property of any sort of the United States within its territory. Any general words are controlled by the specifications. *United States* v. *Weise*, . 72
2. The Pennsylvania Pilot Act of 29th March, 1803, which "obliges" vessels going out of or coming into the port of Philadelphia to receive a pilot, under a "penalty," and "forfeiture" of half-pilotage, which the act makes a lien upon the ship, and recoverable in the Admiralty, is not compulsory, but is optional. The ship need not take a pilot, if it prefers to pay the penalty or forfeiture, *Smith* v. *The Creole and the Sampson*, ... 485

STATUTES, IMPLIED REPEAL OF.
The implied repeal of statutes not being readily to be inferred, a section of an old law containing a short but important expression, was held not to be repealed by a section in a new act which legislated generally on the same subject, omitting only the short expression; the later act being declared to be 'supplemental' to the old one: referring to it as 'incomplete,' and repealing, *in terms*, another section. *Aspden's Estate*, ... 368

STOCKHOLDERS IN BANKS, EQUITY BETWEEN THEM.
Where stockholders in a bank, whose charter gives them a *right*, but does not *oblige* them to pay in full, the prices of stock subscribed, pay, some of them in full, and some but in part, and the bank goes into liquidation from a loss sufficiently partial to allow such a rule: the stockholders who have paid in full have a right to a return of the excess paid by them above the others, who have paid but in part, before any division of its balance takes place. This balance is then to be divided (after deducting the loss) rateably among the stockholders. And this, though the bank has been in operation for many years, making dividends of profits in proportion to the amounts paid in. *Krebbs* v. *The Carlisle Bank*, . . 33
Exemp. Gr. A. B. and C. each subscribe, in 1814, to the stock of a bank, whose shares are $50, to be paid as the Bank Board shall direct. In 1817, the Board *directs*, that all the stockholders pay $30 a share; and *allows* them to pay part, or all the balance. B. pays $10 of the balance, and A. $20—the whole balance; so that A. has paid in all $50, B. $40, and C. $30. The bank makes semi-annual dividends on profits till 1845, when, having $200,000 of its allowed capital paid in, it meets with a loss of $50,000, and goes into liquidation. A. is entitled to receive $10 on his share, before B. receives any thing. And A. is entitled to $10 more on his share, and B. $10 on his share, before C. receives any thing: and then, the loss being deducted, they are to receive rateably. *Id.*

SUBPŒNA.
Although there is an act of Congress, which allows subpœnas *ad testificandum* to run from the Circuit Courts into districts not their own, yet where the witness who

SUBPŒNA—*continued.*

has been thus subpœnaed, shows no disposition to treat the process of the Court with contempt, the issuing of an attachment is always matter of discretion with the Court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the Court will not compel his attendance; but will either postpone the cause or have his deposition taken. *Ex parte Beebees,* . 127

TERMS OF LAW.

1. Their meaning when settled, cannot be shown by extrinsic evidence not to have been rightly understood, or rightly used, nor to give to them an effect which a testator employing them is said to have intended; that effect being conlrary to the one given by their legal meaning. *Aspden's Estate,* 368

e. g. The term 'heir-at-law,' especially when found in context with the term 'lawful heir' as a synonyme, meaning in Pennsylvania, the person on whom the law of the commonwealth casts the real estate of an intestate, at the time of his death; and not meaning the person on whom the common law of England, as distinguished from the law of Pennsylvania, casts such estate, a devise to one's 'heir-at-law,' or 'lawful heir,' passes the estate to such person as, at the time of the testator's death, answer by the then existing law that description; and contemplates not only changes from death in the persons designated by the term, but changes also by legislation in the *laws* regulating successions and descent. Thus where a testator domiciled technically in Pennsylvania, though resident most of his life in England, devised estates to his 'heir-at-law,' or 'lawful heir,' those terms, as the law stood when he made his will, indicating the heir at the common law of England, but, at the time of the testator's death, indicating wholly different persons—st. whole classes, who were absolutely incapable of inheriting, as the law stood when the will was made—it was held that these last persons, and not the former person, were the 'heir-at-law,' or 'lawful heir,' and the parties, therefore, to take. *Id.*

2. The terms 'heir-at-law,' or 'lawful heir,' meaning clearly and fixedly, in Pennsylvania, heir by the law of *that State,* whatever it may be, statutory or other, its meaning is not easily controlled or shaped into the common law signification, when differing from it. Thus where a testator, domiciled technically in Pennsylvania, though resident most of his life in England, devised his estates to his 'heir-at-law,' or 'lawful heir,' he *first* paying certain legacies to A. B. & C.; it was held, that A. B. & C., being the Pennsylvania statutory heirs, should take the estates, notwithstanding the provision by which they would have *first* to pay *themselves* the legacies; and that the estates should not go to D., a different person, the heir at common law, who could more properly *first* pay the legacies to A. B. & C. while subject to, or after such payment, he took the estates himself. *Id.*

3. Though the expression 'heir-at-law,' has been often used in professional and judicial parlance in Pennsylvania, as meaning heir at the common law of England, yet not rightly being and with legal exactness so used (especially when explained by the term 'lawful heir,' used as a synonyme with it,) it presents no such ambiguity as to let in parol evidence, of any kind, as to the sense in which a testator technically domiciled in Pennsylvania, though resident most of his life in England, used it; or more particularly to show that such a testator used it in the sense of the English common law, *i. e.* to mean the person who should, at the time of his death, be nearest in blood and descent from a common ancestor of the full blood, by his father's side, and did not use it in its general legal sense, *i. e.* to mean the person or persons on whom the law of his domicil would cast his real estate, on his death intestate. *Id.*

TIME POLICIES OF INSURANCE.

1. Seaworthiness is not a condition implied in regard to time policies, except under particular circumstances, if it is at all. *Jones* v. *The Insurance Co.,* . . 278

2. The Court, supposing a case not before it says: It *may* indeed be true, that in a time policy there is a warranty of seaworthiness at the commencement of the risk, so far as it lay in the power of the assured to effect it. But in such case the plea must state such facts as show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss; *or,* that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might or ought to have been repaired, the

TIME POLICIES OF INSURANCE—*continued.*
owner or his agents neglected to repair her, and that she was lost in consequence. *Jones* v. *The Insurance Company*, ... 278

TRANSLATION.
A prose translation (having no qualities of a paraphrase) of a copyright prose romance, which the author had herself caused to be translated in a way she liked, and copyrighted, is not an infringement of the author's copyright of the original. *Stowe* v. *Thomas*, ... 547

TREASON.
1. To constitute the offence of treason against the United States, there must be a conspiracy to resist generally and publicly, by force,—and an actual resistance by force or by intimidation, of numbers—a law of the United States. *United States* v. *Hanway*, ... 139
2. A conspiracy to resist by force the execution of such law in particular instances only;—a conspiracy for a personal or private as distinguished from a public and national purpose, is not treason; however great the violence, or force or numbers of the conspirators may be. *Id.*
3. The general law of treason stated in a charge to the grand jury, . . . 134
4. See EVIDENCE, 1, 2 and 3.

ERRATA.

Page 278, 5th line from top, for "supposing on a case," read, supposing a case.
" 301, 9th line from top, for "ownership, do not," read, ownership does not.
" 368, 20th line from top, for "answers," read, answer.

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